Supreme Court, U.S.
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In the
Supreme Court of the United States

ROBIN B. MURPHY,

Petitioner,

v.

UNIVERSITY OF CINCINNATI,
MONTY HOPKINS, GERALD O'DELL,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To establish "direct evidence" in a gender discrimination claim and thereby avoid summary judgment, must the plaintiff establish "an unequivocal assertion that a woman was fired because of her gender" as required by the Sixth Circuit in this case, or is evidence from which a reasonable jury could find a link between the termination and gender (i.e., as in this case, overt objections to plaintiff's gender by the individual who terminated her employment) sufficient, as recognized by the Second, Third, Fourth and Seventh Circuits?

2. May a court properly grant summary judgment against a plaintiff for failing to establish that she was "qualified" for the position as required by the *McDonald-Douglass* paradigm simply because the individual who terminated her employment testified that based on his subjective opinion she was not performing up to the employer's expectations.

3. To qualify as a "similarly situated" employee (e.g. a comparator) for purposes of applying the prima facie case analysis in a discrimination case, must the positions be identical such that any variation no matter how immaterial can defeat a claim, as held by the Sixth Circuit in this case and by the Fourth and Eleventh Circuits in other decisions, or are Judge Clay (the dissenting Court of Appeals judge in this case), the First, Seventh, Eighth and Tenth Circuits correct in their holdings that the "similarly situated" requirement should not be so strictly applied "as to prevent individuals with unique jobs from ever establishing a prima facie case"?

PARTIES TO THE PROCEEDINGS

Petitioner is Robin B. Murphy, former assistant swim coach at the University of Cincinnati. Respondents are the University of Cincinnati, Monty Hopkins, head swim coach at the University of Cincinnati, and Gerald O'Dell, athletic director at the University of Cincinnati.

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The opinion of the court of appeals (App., *infra*, 1a – 19a) is unreported. The judgment of the district court (App., *infra*, 29a – 31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2003. App., *infra*, 1a. The court of appeals denied a request for reconsideration or rehearing *en banc* with one dissent on September 30, 2003. App., *infra*, 32a. The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS

Pursuant to 42 U.S.C. § 2000e-2, it is an unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Further, 42 U.S.C. § 1983 states in pertinent part that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."

STATEMENT

In the summer of 1995, Robin Murphy applied for a position as the assistant swim coach at the University of Cincinnati. Following an initial interview with Monty Hopkins, the head swim coach, Mrs. Murphy was also interviewed by three other individuals from the University. Mrs. Murphy was the most qualified person for the job and was hired.

Mr. Hopkins told Mrs. Murphy that Gerald O'Dell, the athletic director, had forced him to hire a female due to affirmative action obligations of the University. From the outset, Mr. Hopkins made it clear that he did not want to hire a woman for the position. Mr. Hopkins indicated that he would get around the affirmative action requirements next time by simply doing away with the position of assistant swim coach. Mr. Hopkins further indicated to Mrs. Murphy that he resented her because he was forced to hire a woman while many good men were left begging for a job. Mr. Hopkins made similar comments to Mrs. Murphy's husband. Mr. Hopkins reiterated to Mr. Murphy his unhappiness in having to hire a woman. Mr. Hopkins made disparaging remarks regarding the capacity of women to serve in the military and he openly lamented the fact that he was required by the University to comply with its affirmative action obligations. He even asked Mr. Murphy if he had given his wife permission to work at the University.

Mr. Hopkins' animosity towards women was manifested in other actions and statements. Mr. Hopkins expressed frustration that the swim team had to turn down good males in order to make room on the

team for female swimmers. Additionally, Mr. Hopkins referred to an affirmative action training session as "a waste of time." Although Mrs. Murphy viewed Mr. Hopkins comments as "strange" she said nothing to Mr. Hopkins. Mrs. Murphy was "just really looking towards the job" and was excited she "was to get the opportunity to work at the collegiate level."

Mrs. Murphy began her job as assistant swim coach on September 1, 1995. As early as her first day at work, however, Mr. Hopkins began to treat Mrs. Murphy in an objectionable manner. Mr. Hopkins frequently directed Mrs. Murphy to stand idly next to him at practices and swim meets. On one occasion he yelled loudly and abusively at Mrs. Murphy in the presence of another University employee. Mr. Hopkins also said embarrassing things to and about Mrs. Murphy which demeaned her and women in general. For example, he chided her not to "get fat like the last girl," in reference to the previous female assistant swim coach, Buffy Krieger, who was forced to quit by Mr. Hopkins. Ms. Krieger testified that Mr. Hopkins made her feel "worthless."

Mr. Hopkins routinely refused to introduce Mrs. Murphy to other coaches and to swim officials. He told Mrs. Murphy not to help the swimmers on the team because it interfered with their workouts. He even changed a practice time without telling Mrs. Murphy. In another instance, Mr. Hopkins directed Mrs. Murphy to evaluate and rate the swimmers, but then arbitrarily and summarily changed her ratings without explanation. On several other occasion he accused Mrs. Murphy of disrupting his train of thought at a practice session and then directed Mrs. Murphy to stand in the

hallway while practice proceeded. As a consequence of this persistent course of treatment, Mrs. Murphy, like her predecessor Ms. Krieger, began to feel "like a nobody" who "had no job responsibilities with any specific tasks." The way Mr. Hopkins treated Mrs. Murphy contrasts markedly with how he treated the one other assistant swim coach, Mr. Charlie Casuto.

Mrs. Murphy complained to Mr. Hopkins that he was embarrassing her and humiliating her and asked him to stop. Mr. Hopkins replied by telling Mrs. Murphy that as head coach he could direct her to do anything he wanted, 24 hours per day. Mr. Hopkins' behavior persisted despite Mrs. Murphy's effort to address her concerns forthrightly with him. Mrs. Murphy brought her complaints of disparate and discriminatory treatment to the University ombuds person, Mitzi Cole who then referred her to athletic director Mr. O'Dell. At a November 6, 1995 meeting with Mr. O'Dell and Ms. Cole, Mrs. Murphy related Mr. Hopkins' sexist statements and discriminatory treatment. Mrs. Murphy indicated to Mr. O'Dell that she believed Mr. Hopkins was attempting to harass and intimidate her into quitting her job because he resented having to hire a woman. Mr. O'Dell assured Mrs. Murphy he would look into her concerns. He also told Mrs. Murphy not to report back to work in the mean time.

The next day, at the suggestion of Mr. Hopkins, Mr. O'Dell advised Mrs. Murphy that she was being placed on administrative leave. On that same day, Mr. Hopkins began the process of obtaining Mrs. Murphy's termination by preparing an unfavorable evaluation of her performance. On November 28, 1995, Mr. Hopkins

and Mr. O'Dell met to discuss Mrs. Murphy's complaints. Mr. Hopkins questioned whether Mrs. Murphy was a team player because she had gone to the ombuds office to register her complaints about sexual discrimination. Mr. Hopkins requested permission from Mr. O'Dell to fire Mrs. Murphy immediately. Mr. O'Dell granted that permission based solely on the recommendation of and the information he received from Mr. Hopkins. On December 8, 1995, with the knowledge and authorization of Mr. O'Dell, Mr. Hopkins sent Mrs. Murphy a letter terminating her employment with the University for alleged insubordination.

During Mrs. Murphy's employment, Charlie Casuto was also employed as an assistant swim coach. Mr. Casuto worked with the divers on the swim team, and Mrs. Murphy worked with the swimmers. In all other respects, their jobs were essentially the same. Both Mrs. Murphy and Mr. Casuto held the position of assistant swim coach. Both reported directly to and were supervised by Mr. Hopkins. Perhaps most significantly, Mrs. Murphy and Mr. Casuto had identical written job descriptions. The essential duties of each of the two positions were virtually indistinguishable. Like Mrs. Murphy, Mr. Casuto had coaching duties, responsibility to transport athletes to meets, to recruit athletes, to evaluate athletes' performances and to fill out practice logs and forms. The only substantive distinction between their respective positions was the particular aquatic discipline in which they were each involved; swimming and diving. Insofar as their essential duties were concerned, however, their duties were on a par.

Ms. Murphy brought a lawsuit against Defendants on March 20, 1997, and subsequently filed an amended complaint, alleging that Defendants discriminated against her on the basis of her sex and then retaliated against her for opposing those acts of discrimination in violation of Title VII, § 1983, and Ohio law. The district court granted summary judgment on Ms. Murphy's discrimination claims and allowed only her retaliation claims to go to trial. (App., *infra* 29a – 31a).[1] After a trial during which the evidence relating to Mrs. Murphy's dismissed discrimination claim was excluded, a jury returned a verdict in favor of Defendants on February 18, 2000 with respect to the retaliation claims. Ms. Murphy moved for JNOV and a new trial, but that motion was denied on March 12, 2001. On April 10, 2001, Ms. Murphy filed a timely notice of appeal to the Sixth Circuit on issues surrounding the summary judgment motion and the JNOV motion. A three-judge panel of the Court of Appeals affirmed the decisions of the district court on July 29, 2003, although Judge Clay issued a strongly-

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[1] The District Court adopted without any substantive analysis the report and recommendation of Magistrate Judge Hogan which recommended the dismissal of Mrs. Murphy's sex discrimination claims for failure to make out a prima facie case on the following erroneous rationale: 1) she was not "*qualified*" for the position because, solely according to Mr. Hopkins, she was not *performing* satisfactorily; 2) other than her termination, there was no adverse employment action; and 3) there was no evidence of differential treatment of a similarly situated employee because, despite their identical position descriptions, Mr. Casuto was not a comparator. Remarkably, neither the Magistrate nor the District Court ever addressed Plaintiff's argument that the record contained direct evidence of Mr. Hopkin's discriminatory animus towards her specifically and women in the workplace generally.

worded dissent. (App., *infra* 1a – 28a). Ms. Murphy moved for reconsideration or rehearing en banc which was denied, again with one dissent, on September 30, 2003.

REASONS FOR GRANTING THE WRIT

I. Direct Evidence

Neither the Magistrate nor the District Court addressed Plaintiff's contention that direct evidence of gender bias precluded summary judgment. The Sixth Circuit at least addressed the issue, but determined that Mrs. Murphy had not presented direct evidence sufficient to survive summary judgment based on the incorrect proposition that "[d]irect evidence in a sex-based discrimination context usually comes in the form of an unequivocal assertion that a woman was fired because of her gender." (App., *infra* 12a). In fact, Mrs. Murphy identified numerous statements reflecting gender bias by Mr. Hopkins relating directly to and reflecting on Mrs. Murphy's employment.[2]

The Court has held that in addition to making the *prima facie* case, a plaintiff may also survive the summary judgment phase and present his or her case to the jury based on the production of direct evidence of discrimination. *See Desert Palace*, 123 S.Ct. 2148.

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[2]Mr. Hopkins made repeated statements to Mrs. Murphy and her husband that exemplified his distatste for having had to hire a woman and his intent to avoid working with a woman in the future. Mr. Hopkins articulated his view that Plaintiff could not perform her job satisfactorily for the sole and illegal reason that she is a woman.

However, the Court has provided little guidance on what actually constitutes direct evidence, instead leaving that determination for the various circuit courts to decide.[3] Thus, a range of definitions has developed which allow statements to qualify as direct evidence in some judicial circuits but not others. Several circuits have taken the approach that direct evidence is evidence from which a reasonable jury could find that there is a link between the adverse job action and the protected characteristic. *See Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999); *Robin v. Espo Engineering Corp.*, 200 F.3d 1081 (7th Cir. 2000); *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3rd Cir. 2002); *Rose v. New York City Board of Education*, 257 F.3d 156 (2d Cir. 2001).

On the other end of the spectrum, another group of circuits has taken the position that direct evidence must prove the existence of discrimination without any inference or presumption by the finder of fact. *See Maynard v. Board of Regents*, 342 F.3d 1281 (11th Cir. 2003);[4] *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 920 (9th Cir. 2002); *Johnson v. Kroger Co.*, 319 F.3d 858 (6th Cir. 2003); *Portis v. First National Bank*

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[3]The Supreme Court has only generally defined direct evidence in the negative by stating that it excludes "stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (O'Connor, J., concurring)

[4]The Eleventh Circuit remains internally conflicted about the nature of direct evidence. *Cf. Wright*, 187 F.3d 1287.

of New Albany, 34 F. 3d 325 (5th Cir. 1994). The Sixth Circuit has even gone so far as to hold that direct evidence requires an "unmistakable" verbal assertion that the plaintiff was treated adversely because of race. *See Smith v. Chrysler Corp.*, 155 F.3d 799 (6th Cir. 1998).

The degree of certainty required to constitute direct evidence ranges from the Sixth Circuit's requirement for a statement as blatant as "I fired you because you are disabled"[5] to evidence of discriminatory bias of the decision maker. The result of the Sixth Circuit's holding is that even where, as here, a reasonable jury *could* infer discriminatory intent from the statements attributed to the alleged discriminator, it will not be permitted to hear the case if the employer is shrewd enough to veil its unlawful action behind measures designed to defeat a prima facie case built on circumstantial evidence. If the Sixth Circuit is correct, the only thing for the jury to decide in a case involving what it calls direct evidence will be whether the attributed statement was actually made, and, if so, the amount of damages because the Sixth Circuit's definition of direct evidence precludes virtually all evidence from qualifying as direct except the most blatant and unlikely admission.[6]

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[5]*Smith*, 155 F.3d at 805.

[6] In his dissent, Judge Clay objected to the majority's absurd categorization of Plaintiff's direct evidence as actually cutting against her claims. (App., *infra* 26a – 27a). The majority in this case went to extreme lengths, contrary to the precedents of this Court and numerous other circuits, to ensure that Mrs. Murphy's discrimination claims did not reach a jury.

The Sixth Circuit's holding conflicts with precedent from the Supreme Court and other circuits, as well as the policies embodied in the Civil Rights Act of 1991. For example in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993), Justice Scalia wrote that a prima facie case is made if "reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a prima facie case . . ." Thus, as direct evidence supports the prima facie analysis, there is a no reason that such evidence should be found less sufficient simply because reasonable minds could differ. Likewise, in the Civil Rights Act of 1991, Congress mandated that allowing gender to play any motivating role in an employment decision is unlawful, regardless of whether its role was determinative. 42 U.S.C. §§ 2000e-2(m) and 2000e-5(B)(2). Under the Court's decision in *Desert Palace*, this provision can be triggered by either direct or indirect evidence. However, if courts are permitted to so narrowly define direct evidence as to prevent cases from getting to a jury, as can occur easily in the Sixth Circuit, the clear intent of the 1991 Amendment, to eradicate unlawful considerations in employment decisions, will be defeated. In sum, the Sixth Circuit's decision in this case does not sharpen but only dulls the inquiry into discrimination. *See e.g. St. Mary's Honor Center*, 509 U.S. at 506 (noting that the goal of the mechanisms devised by the Court under Title VII is to "sharpen the inquiry into the elusive factual question of intentional discrimination." (Citations omitted).

Mr. Hopkins told Mrs. Murphy that he objected to having to hire her because the University required him to hire a woman when there were "qualified males who were begging for the job." Perhaps Mr. Hopkins

could try to squirm his way out of his comment with a purportedly benign explanation. However, another equally if not more logical inference is that he did not want to hire a woman, and, therefore, he mistreated and fired the woman he was required to hire. On summary judgment the nonmoving party is entitled to every reasonable inference, and in this case an inference of discrimination is obvious and easily drawn. To avoid the effect of this inference by defining "direct evidence" so narrowly that it is unlikely to ever arise precludes a jury from drawing every reasonable inference of discrimination. Short circuiting the appropriate inquiry into the existence *vel non* of discrimination surely defeats Congress' purpose in enacting the 1991 Amendment.

II. The prima facie test

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court set out the elements of a *prima facie* test in employment discrimination cases. In order to make a *prima facie* showing, a plaintiff must demonstrate that: 1) she is a member of a protected class; 2) she suffered an adverse job action; 3) she was qualified for her job; and 4) a similarly-situated individual outside the protected class received better treatment. *Id.* at 802. The Court outlined these general parameters with the intention that they should not be applied in a "rigid, mechanized, or ritualistic" manner. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). One of the basic premises of the *prima facie* test in an employment discrimination case is that it is not an onerous burden to establish a *prima*

facie showing.[7] *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Further, the Second Circuit has noted that an "extra measure of caution is merited" in affirming summary judgment on employment discrimination cases. *Holtz v. Rockefeller Corp.*, 258 F.3d 62 (2d Cir. 2001).

Since *McDonnell Douglas*, the Court has provided related guidance on the operation of the burden shifting paradigm,[8] the specificity of the pleadings required to set forth a discrimination claim,[9] and appropriate jury instructions.[10] The Court has not, however, further explained what is required to make a showing for each of the prongs. In the absence of such guidance, the circuit courts have interpreted the prongs differently and have created inconsistent paths for victims of discrimination. As this case illustrates well, some Circuits such as the Sixth, have raised the bar for making a prima facie case to the point of near insurmountability, especially on the issues of showing an employee is "qualified" for the position and that "similarly situated" employees were treated better. As

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[7]The First Circuit acknowledges that making a *prima facie* showing is not onerous and amounts to a small showing. *See Kosereis v. Rhode Island*, 331 F.3d 207 (1st Cir. 2003). The Second Circuit has categorized the showing for a *prima facie* case as "minimal." *See McGuinness v. Lincoln Hall*, 263 F.3d 49 (2d Cir. 2001).

[8]*See Burdine*, 450 U.S. 902 (1981); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[9]*See Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

[10]*See Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148 (2003).

a result, cases that would easily get to a jury in one circuit are dismissed on summary judgment in another, leaving employees to question: what is required to bring my case to a jury?

A. "Qualified"

The Sixth Circuit held that Mrs. Murphy was not qualified for her position because she provided no evidence that her supervisor "was ever happy with her performance once she commenced employment." (App., *infra* 10a). According to two members of the panel, this is the analysis to be employed to determine whether the plaintiff met her employer's "legitimate expectations."[11] The majority of the panel simply ignored the fact that the person stating that Mrs. Murphy did not meet expectations was the very person who stands accused of discriminating against her.[12]

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[11] In other decisions, the Sixth Circuit has similarly held that an employee is qualified if she meets her employer's legitimate expectations and was performing to her employer's satisfaction. *See Dews v. A.B. Dick Co.*, 231 F.3d 1016 (6th Cir. 2000). Another group of circuits simply states that an employee must meet her employer's "legitimate expectations." *Detz v. Greiner*, 346 F.3d 109 (3d Cir. 2003); *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). These circuits, like the Sixth Circuit, do little to define "legitimate" and make no effort to separate objective requirements from subjective expectations of the employer, who in many cases, is the party charged with the discrimination and would thus have an incentive to find an employee subjectively unqualified.

[12] Indeed, the court simply ignored unequivocal testimony by Mr. O'Dell, the University's athletic director, that he had interviewed Mrs. Murphy and considered her qualified for the position. Federal courts have recognized and instructed on the so called "same actor" inference to discrimination claims where the

Additionally, the Sixth Circuit failed to differentiate between objective and subjective qualifications for a job. The result is a blending of the "qualified" element of the *prima facie* case with the pretext analysis and disregard for this Court's guidance in *Reeves v. Sanderson Plumbing*,530 U.S. 133 (2000), that summary judgment should not be premised solely upon the testimony of interested witnesses, as it was in this case.[13]

In contrast to the Sixth Circuit's approach, other circuits have noted that the *prima facie* case should not be used to impose an onerous burden and that the "qualified" element is easily met. The First Circuit has held that "qualified" means capable of performing the job. *See Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11 (1st Cir. 2002). The Second Circuit has similarly required minimal proof of "qualified," noting that the employee need only show that she has the minimum job skills. *See Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87 (2d Cir. 2001). The Eighth Circuit has stated that an employee must only show

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alleged discrimination was the same individual who hired the plaintiff. However, the Sixth Circuit's reasoning ignores the corollary to this principle by blindly crediting the subjective testimony of the most interested witness as the basis for summary judgment.

[13] In *Reeves* the Court held that, in considering summary judgment, courts should "disregard all evidence favorable to the moving party that the jury is not required to believe . . . That is, the court should give credence to . . . that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." 530 U.S. 133, 151 (2000) (citations omitted).

that she was "minimally qualified" for purposes of the *prima facie* analysis. *See Turner v. Honeywell Federal Man. & Tech., LLC*, 336 F.3d 716 (8th Cir. 2003). The Eighth Circuit has also indicated that the fact that a comparator may be *more* qualified is irrelevant to whether the plaintiff is qualified for purposes of the prima facie case, but that such evidence may be properly be considered at the pretext phase. *See Ross v. Kansas CityPower & Light Co.*, 293 F.3d 1041, 1046-47 (8th Cir. 2002).

Several circuits have noted the danger exemplified by the Sixth Circuit's reasoning in this case that allows an employer to easily insulate itself from a claim of discrimination by coming up with subjective reasons for why an employee is not "qualified" for purposes of the *prima facie* test. These circuits have held that only objective criteria regarding the issue of "qualified" should be considered at the *prima facie* stage, and that subjective negative performance evaluations are left for consideration in the pretext phase later in the burden shifting analysis. *See Weldon v. Kraft, Inc.*, 896 F.2d 793 (3rd Cir. 1990); *EEOC v. Horizon/CMS Helathcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982); *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458 (5th Cir. 2001); *Lyn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981); *McCullough v. Real Foods, Inc.*, 140 F.3d 1123 (8th Cir. 1998); *Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1354 (11th Cir. 1999). These circuits have rejected an analysis of a plaintiff's qualification for the position based upon an employer's subjective evaluation because, if that standard were applied, most plaintiffs in discrimination

cases will be barred from pursuing their claims before the employer's conduct or motivation is ever considered. *See McCullough* 140 F.3d at 1128 ("subjective criteria ... are particularly easy for an employer to invent in an effort to sabotage plaintiff's claim and mask discrimination."). An employer's evidence of poor work performance should not be considered at the *prima facie* stage, but rather objective qualifications and even the employee's own assessment of her work are sufficient to establish "qualified" status. *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115 (10th Cir. 1991).

The Seventh Circuit has recognized that the analysis of whether an employee met her employer's legitimate expectations as part of the *prima facie* analysis can often merge or overlap with the pretext analysis. *Jones v. Union Pacific Railroad Co.*, 302 F.3d 735 (7th Cir. 2002). Consequently, the Seventh Circuit only applies objective criteria to the question of whether an employee is qualified. *Schaffner v. Glencoe Park Dist.*, 256 F.3d 616 (7th Cir. 2001). In fact, the Seventh Circuit has even gone so far as to note that a plaintiff may disregard this prong and not have to show that she met legitimate expectations of her employer under certain circumstances. *See Curry v. Menard, Inc.*, 270 F.3d 473 (7th Cir. 2001).

It cannot be disputed that Mrs. Murphy clearly met all of the *objective* criteria for the position. After an application and interview process, she was deemed to be the most qualified candidate. Her only performance evaluation was prepared one day after she was placed on administrative leave for raising concerns about Mr. Hopkins' gender bias, and she was fired for

alleged "insubordination" three months after her hire. As Judge Clay noted in his dissent, Defendants' claim that Mrs. Murphy was not meeting her employer's expectations were subjective evaluations by the very parties alleged to have engaged in discrimination. (App., *infra* 22a). Judge Clay pinpointed the inherent problem with the majority's approach, namely that "an employer can easily respond to a Title VII plaintiff's allegations by claiming her job performance was unsatisfactory according to the employer's subjective criteria." (App., *infra* 20a – 21a). Judge Clay noted that an employer accused of discrimination has incentive to lie by the majority's reasoning which "gives employers *carte blanche* to discriminate against an employee as long as they downgrade her through subjective evaluations and fire her quickly."[14] (App., *infra* 22a). Judge Clay emphasized that other courts considered only objective criteria at the *prima facie* stage and relegated subjective evaluations with "healthy skepticism" in the latter stages of the burden-shifting analysis. (App., *infra* 21a).

Judge Clay's dissent also highlighted another problem with the majority's approach. By accepting subjective reviews to dismiss a case at summary judgment, the majority "ignores the Supreme Court's instructions on the proper appellate review of summary judgment." (App., *infra* 24a). On this point, the Third Circuit has noted that where the employee disputes some of the reasons for the discharge, the issue of

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[14]Judge Clay noted that Mrs. Murphy refuted Mr. Hopkins' negative assessments, and indeed *no one* was able to corroborate his reports that Mrs. Murphy performed her job in an unacceptable manner. (App., *infra* 23a).

whether she is "qualified" becomes an issue of fact for the jury to determine. *Smith v. Davis*, 248 F.3d 249 (3d Cir. 2001). The majority's position is at odds with both this Court's decisions and those from the majority of other circuits.

B. "Similarly Situated"

The Sixth Circuit determined that Mrs. Murphy had not met the "similarly situated" prong of the *prima facie* case because, although Mr. Casuto had the same title, the same supervisor and the identical position description, Mrs. Murphy's position was, according to the court, "unique" and her "lack of experience prevents her from comparing herself" to the most comparable position. (App., *infra* 11a). The Sixth Circuit and several other circuits have taken the position that "similarly situated" means having the same supervisor, the same standards, and the same conduct without any other mitigating circumstances. *See Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). The Fourth Circuit has adopted a similar position to the Sixth Circuit's in Mrs. Murphy's case. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598 (4th Cir. 1999) (two candidates were not similarly situated where they had different qualifications).

Some circuits have articulated standards even more onerous than the Sixth Circuit's. The Eleventh Circuit has held that an employee's alleged misconduct must be "nearly identical" to that of a comparator. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984). The Fifth Circuit has also adopted the "nearly identical" approach to the issue of

similarly situated. *See Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086 (5th Cir. 1995).

On the other end of the spectrum, a group of circuits has remained more faithful to the notion that no prong of the *prima facie* test should be unduly onerous. The First Circuit has held that whether an employee and her comparator were "treated differently" is not a matter for *prima facie* discussion, but is rather a factor to be considered in pretext. *See Kosereis v. Rhode Island*, 331 F.3d 207 (1st Cir. 2003). The Eighth Circuit has held that comparing the relative qualifications of comparators to determine whether they are "similarly situated" is inappropriate at the *prima facie* stage and would undermine the entire *McDonnell Douglas* analysis. *See Turner v. Honeywell Federal Man. & Tech., LLC*, 336 F.3d 716, 720-22 (8th Cir. 2003). Indeed, the Tenth Circuit has gone so far as to drop the fourth prong involving "similarly situated" from its *prima facie* analysis altogether. *See Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000).

Mrs. Murphy sufficiently demonstrated that Mr. Casuto was a relevant comparator for purposes of the prima facie case. In his dissent, Judge Clay noted that Mrs. Murphy presented evidence from which a jury could conclude that her position was comparable to that of Mr. Casuto. Even if Mrs. Murphy did hold a unique position, that should not be fatal to her *prima facie* case. A person is not precluded from recovering for discrimination because there is no mathematically identical position. *See Johnson v. Zema Systems Corp.*, 170 F.3d 734 (7th Cir. 1999). "An employer cannot insulate itself from claims of racial discrimination

simply by providing different job titles to each of its employees." *Id.* at 743. The Third Circuit has noted that the uniqueness of a position is a matter for pretext discussion, not analysis of whether a *prima facie* case has been made. *See Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996).

As Judge Clay noted in his dissent, the majority "err[s] by interpreting the 'similarly situated' requirement so strictly as to prevent individuals with unique jobs from ever establishing a *prima facie* case." (App., *infra* 24a). In this regard, the Sixth Circuit's ruling is at odds with the pronouncements of several of the other Judicial Circuits and inconsistent with this Court's precedents.

CONCLUSION

The Sixth Circuit's decision in the underlying case has resulted in a serious blow to employment discrimination litigants. As Judge Clay noted in his dissent:

> As it now stands, this decision will make it easier for employers to avoid federal anti-discrimination law entirely in circumstances when (1) the employee's position is unique; (2) the discrimination and firing occurred before the employee had the opportunity to secure legitimate positive evaluations; and -- most important -- (3) when the employee's lone evaluator is himself the discriminator. The majority thus attempts to weaken Title VII jurisprudence.

(App., *infra* 26a). If the Sixth Circuit's decision is allowed to stand without guidance from the Supreme Court, the differences in discrimination law between the judicial circuits will continue to grow. Congress and this Court have consistently maintained that Title VII and other such remedial statutes should be broadly interpreted to eliminate the scourge of unlawful discrimination. Moreover, summary judgment is designed to weed out clearly unmeritorious cases – not as a strategic game to see who can better manipulate the burden-shifting paradigm. For the forgoing reasons, this petition for certiorari should be granted on the questions presented herein.

Respectfully Submitted,

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No. 01-3376

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBIN B. MURPHY,
Plaintiff-Appellant,

v.

UNIVERSITY OF CINCINNATI, et al.,
Defendants-Appellees.

July 29, 2003, Filed

COUNSEL: For ROBIN J. MURPHY, Plaintiff - Appellant: Marc D. Mezibov, Michael N. Budelsky, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH.

For UNIVERSITY OF CINCINNATI, MONTY HOPKINS, GERALD O'DELL, Defendants - Appellees: Doreen Canton, Kerry P. Hastings, Taft, Stettinius & Hollister, Cincinnati, OH.

JUDGES: BEFORE: BOGGS, SUHRHEINRICH, and CLAY, Circuit Judges. BOGGS, Circuit Judge, concurring. CLAY, Circuit Judge, dissenting.

OPINIONBY: SUHRHEINRICH

OPINION: SUHRHEINRICH, Circuit Judge. Plaintiff-Appellant Robin Bente Murphy appeals from the order entered on July 23, 1999 in the United States District Court for the Southern District of Ohio, granting partial summary judgment in favor of

Defendants-Appellees University of Cincinnati, Head Swimming Coach Monty Hopkins, and Athletic Director Gerald O'Dell (collectively, "UC"), dismissing Murphy's allegations of sex-based discrimination arising out of her dismissal as UC's assistant swimming coach. Murphy also appeals from the jury verdict and judgment entered February 18, 2000 in favor of UC, denying Murphy's allegations of improper retaliation under Title VII, and from the order denying Murphy's motion for a new trial entered on March 12, 2001.

Murphy raises two assignments of error. First, she claims the district court erred in entering partial summary judgment because she had presented either a prima facie case or direct evidence of sex-based discrimination. Second, she argues the jury verdicts were inconsistent and against the weight of the evidence. Accordingly, she argues it was error that her motion for a new trial was denied.

We affirm the decision of the district court. First, summary judgment was proper because Murphy has failed to present either direct or prima facie evidence of sex-based discrimination. Furthermore, Murphy has not demonstrated that a similarly-situated male would have been treated differently. Second, the district court did not abuse its discretion by denying Murphy's motion for a new trial because the jury's answers to specific interrogatories were plausible and not inconsistent.

I. Background

Murphy was hired by UC Head Swimming Coach Monty Hopkins prior to the 1995-96 school year as an

assistant swim coach. Murphy had been a high school classmate of Hopkins and a varsity swimmer at Miami University, but she had no prior coaching experience on the collegiate level.

Hopkins and Murphy began to work together, but their relationship became increasingly tense. Eventually there came a point where Hopkins and Murphy could no longer work together. Murphy became increasingly agitated at the way she felt she was being treated by Hopkins and sought consultation with UC officials.

At some point during the week of November 1, 1995, Murphy voiced her concerns to UC ombudsman Mitzi Cole, who directed her to talk to O'Dell. On November 6, Murphy and O'Dell met, at which time O'Dell informed her that he would look into her concerns and that she should not return to work. The next day, O'Dell sent Murphy a letter indicating that she was being placed on administrative leave.

On November 28, O'Dell met with Hopkins and informed him of his meeting with Murphy. In turn, Hopkins expressed his concerns with Murphy's attitude and refusal to follow his direction, and requested permission to fire her. O'Dell granted the permission and Murphy was summarily fired on December 8, 1995, for insubordination.

On March 20, 1997, Murphy filed a pro se complaint against UC in the district court below. She retained representation and filed an amended complaint on October 9, 1997, adding Hopkins and O'Dell as defendants.

Murphy filed a four count complaint. Principally, she claimed discrimination and improper retaliation under Title VII. 42 U.S.C. § 2000e, et seq. On May 12, 1999, a magistrate judge issued a report and recommendation granting UC's motion for summary judgment and dismissing Murphy's sex-based discrimination claims, but preserving her retaliation claim against all defendants. On July 23, 1999, the district court accepted the recommendation and issued an order incorporating the magistrate judge's report.

The retaliation claims were heard by a jury. The jury returned its verdict against Murphy on February 18, 2000. On March 6, 2000, Murphy filed a motion for a new trial, claiming that the jury verdicts were inconsistent and against the weight of the evidence. On March 12, 2001, the district court denied the motion.

Murphy filed a notice of appeal on April 10, 2001. Accordingly, Murphy's case is timely before this Court, pursuant to Fed. R. App. P. 4(a)(1)(B).

II. Standard of Review

Murphy claims that the district court erred in granting UC summary judgment on her sex-based discrimination claim. We review orders for summary judgment de novo. See Sargi v. Kent City Bd. of Educ., 70 F.3d 907, 910 (6th Cir. 1995). Moreover, we weigh all evidence in favor of the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

III. Discrimination Claim

Murphy contends that she was fired solely because she is a woman. In support of her allegation, Murphy presents several instances that she believes demonstrate Hopkins' discriminatory intent. First, Murphy claims Hopkins would make her stand next to him at practice, doing nothing, causing her to feel awkward. Moreover, she cites instances where Hopkins sent her out of practice because she was disturbing his concentration, embarrassing her in front of the team. She says that Hopkins would walk ahead of her and continually fail to introduce her to other coaches and officials at meets. Moreover, Murphy claims Hopkins would change Murphy's evaluations of swimmers and regrade them based on his own criteria, thereby stripping her of what responsibility she did have. Murphy claims that Hopkins would also direct her not to assist swimmers during workouts because he said it interfered with their preparation, again leaving her to stand idly by with nothing to do. Moreover, Murphy took exception to Hopkins unilaterally changing times of practice without informing her or gaining her consent.

In short, Murphy claims Hopkins did not seek her advice in running the team or give her the level of responsibility that she had anticipated.

Further, Murphy presents what she believes to be verbal evidence of Hopkins' discriminatory tendencies. Murphy alleges that Hopkins called a seminar on affirmative action a "waste of time." She also claims that Hopkins expressed disdain over the fact that he was being forced to hire a woman while good men were left

"begging for a job." Lastly, Murphy claims that Hopkins once told her not to "get fat like the last girl," supposedly referring to the female assistant who preceded Murphy.

To survive summary judgment, Murphy must either show a prima facie case of sex-based discrimination or direct evidence thereof.

A. Murphy's Prima Facie Claim

In order to show a prima facie case, Murphy must show: 1) she is a member of a protected class; 2) there was an adverse employment action; 3) she was qualified for her job; and 4) a similarly-situated male was treated more favorably for the same or similar conduct. Mitchell v. Toledo Hosp., 964 F.2d 577, 582-83 (6th Cir. 1992); see also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) ; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1972); Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002) (citing Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1246 (6th Cir. 1995)). This fourth factor has also been characterized as whether the plaintiff was replaced by a non-member of her class. See Mitchell, 964 F.2d at 583. First, Murphy, as a woman, is a member of a protected class. See, e.g., Dobbs-Weinstein v. Vanderbilt University, 185 F.3d 542, 544 (6th Cir. 1999), cert. denied, 529 U.S. 1019, 146 L. Ed. 2d 313, 120 S. Ct. 1421 (2000). Second, Murphy is correct that being fired constitutes an adverse employment action. Cf. Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885-86 (6th Cir. 1996) (stating that an adverse action is one that is "materially adverse," evidenced by a loss in pay or

benefits).

Next, Murphy must show that she is qualified for the position. Murphy insists that because she was hired, she is necessarily qualified for her position. Hopkins claims that Murphy is not qualified because she had failed to meet his expectations once her employment commenced, and that if she was treated rudely, it was not because she is a woman, but because of her bad attitude and poor work ethic. He states that Murphy constantly challenged his coaching technique, telling him that she disagreed with his coaching style and that he taught the athletes incorrectly. She once suggested that she wanted to "change" Hopkins. Hopkins asserts that he took exception to this because Murphy was a subordinate who lacked any degree of collegiate coaching experience.

Hopkins also indicates that Murphy had violated NCAA rules. He asserts, and Murphy conceded, that within two weeks of her hire, she was asked by Hopkins to pick up a recruit from the airport and bring her to campus. On the way, Murphy stopped and purchased a meal for the recruit, in violation of NCAA rules. Hopkins told Murphy to report herself to UC's compliance officer, but otherwise chose not to discipline her.

Hopkins also maintains that Murphy constantly challenged his orders. He asserts that, at one point, he asked Murphy to drive the team home from a road trip in Indiana, because he was going elsewhere to attend a wedding reception. Although she drove the team, she took exception to the request, and demanded that Hopkins give her prior notice of such requests in the

future. Both parties agree that there was a confrontation and Hopkins told Murphy that if she was "too stupid" to find her way home, he would have somebody else drive the team in the future. Moreover, Hopkins claims Murphy told him that she would refuse to perform any tasks she deemed to be "unreasonable." This included routine maintenance of team equipment, such as sanding a weight rack. Hopkins claims that such routine maintenance was expected of the assistant.

Murphy further told Hopkins that she did not consider the assistant coach position to be a full-time, twenty-four hour per day job. Accordingly, she made a blanket refusal to make herself available, citing lack of adequate compensation and interference with collateral employment. Hopkins indicates that he considers the assistant position to be a twenty-four hour per day job and insists that he made that clear to Murphy during the interview process, and made her agreement to that a prerequisite to employment. He further contends that he told Murphy that, due to the hours required by the assistant position, she was not permitted to engage in collateral employment without consent.

Lastly, Hopkins asserts that Murphy failed to show signs that she was improving and learning on the job. He points to an instance when, several months into her employment, Murphy informed Hopkins that she had never learned how to operate the swimmers' timing system. Altogether, Hopkins claims that he fired Murphy because she was not qualified for the job in that she continually failed to meet the standards to which he holds his assistant.

The district court found that Murphy failed to establish that she was qualified for her position because she continually failed to meet Hopkins's expectations. Murphy argues that the standard used by the district court was "absolutely incorrect," claiming that, under a discrimination analysis, the criteria used by an employer to judge his subordinates must be objective, and not merely subjective. For this proposition, Murphy cites McCrory v. Kraft Food Ingredients, 1996 U.S. App. LEXIS 26305, No. 94-6505, 1996 WL 571146, at *4 (6th Cir. Oct. 3, 1996) (stating that "qualified in this case means objectively qualified, such as proper training, credentials, etc.").

To begin, the test in this Circuit for whether an employee was qualified for her position is whether she met the employer's legitimate expectations. McDonald v. Union Camp Corp., 898 F.2d 1155, 1160 (6th Cir. 1990) (stating that in order to show qualification, an employee must show that he was "performing his job at a level which met his employer's legitimate expectations" at the time of his dismissal) (citations omitted); Ang v. Procter & Gamble Co., 932 F.2d 540, 548-49 (6th Cir. 1991) (referring only to employer's expectations). McCrory is distinguishable on its facts. There, an elderly chemist was fired. The employer claimed McCrory was terminated because he had not met legitimate expectations. We found that McCrory had established he was "qualified" for purposes of making out a prima facie case of age discrimination because, in addition to presenting evidence that he had received the requisite training as a chemist, McCrory presented evidence of favorable reviews, awards, and commendations from his employer. Therefore, it was obvious that McCrory had met his employer's

expectations, and we found that the employer's stated reasons that McCrory's performance was substandard was little more than a pretext for his dismissal.

Like McCrory, Murphy may have met her employer's initial qualifications at hiring. However, unlike McCrory, Murphy has provided no evidence, nor does she even contend, that Hopkins was ever happy with her performance once she commenced employment. Murphy would have us hold that once a woman is objectively qualified through proper training, licensure, or output requirements, she can never be found unqualified, regardless of her actual performance. Since Murphy does not dispute Hopkins' basic assertions that she refused to do what was asked of her, we find that Murphy has not provided sufficient evidence to show that she was qualified for the position and she has failed to overcome UC's summary judgment motion.

Even if we had found that Murphy was qualified for the position, she has not demonstrated that she was treated worse than a similarly-situated male. Murphy claims that Charlie Casuto, the UC diving coach, is a similarly-situated male, because each was an assistant coach under Hopkins. However, this factor cannot be examined in a vacuum. "Similarly-situated," as a term of art, means similarly situated in all relevant aspects. See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998). In comparing herself to Casuto, Murphy is comparing herself to a man who was in his twenty-second year at UC, had earned eight various coach of the year awards, had coached nineteen all-americans, and one olympian. Furthermore, Casuto did all the recruiting for the diving team, independent of

the swimmers. Hopkins neither set Casuto's hours nor directed his style. Moreover, Murphy has not presented evidence to suggest that Casuto ever challenged Hopkins' authority or his coaching techniques, or violated NCAA rules.

However, even if Casuto and Murphy do not share the same responsibilities and the same title, Murphy seeks to compare herself with Casuto because her position is unique. Courts have held that a woman who holds a unique position may stretch the bounds of the "similarly-situated male" rules to compare herself with men with different job characteristics. Cf. Johnson v. Zema Sys. Corp., 170 F.3d 734, 743 (7th Cir. 1999) (allowing comparison to males with different job titles because there was otherwise no relevant difference in status). However, Murphy's reliance on Johnson is misplaced. Johnson proposes that a woman with a unique position can only compare herself to a man in a different position if she is similarly-situated to that man in all other respects. Murphy's lack of experience prevents her from comparing herself to Casuto.

As stated above, the fourth factor has also been characterized as whether the plaintiff was replaced by a non-member of the protected class. See Mitchell, 964 F.2d at 583; McCrory, 1996 U.S. App. LEXIS 26305, 1996 WL 571146 at *4. We find this reframing necessary in situations like this where the plaintiff has no similarly-situated male counterpart. Otherwise, a woman's legitimate claim of sex-based discrimination could be defeated simply because she has no male to whom she can compare herself. However, at least as far as the record before us, all of Hopkins's assistants, including his current one, have been women.

Accordingly, Murphy has failed to show a prima facie case of sex-based discrimination.

B. Murphy's Direct Claim

Nonetheless, Murphy is correct that her discrimination claim can still stand if she can otherwise show direct evidence of discrimination. See Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 113 (6th Cir. 1987). Direct evidence in a sex-based discrimination context usually comes in the form of an unequivocal assertion that a woman was fired because of her gender. See Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998) (giving as example of direct evidence an employer telling a handicapped person, "I fired you because you are disabled."); Terbovitz, 825 F.2d at 113 (indicating that plaintiff was denied employment and told that employer would not hire a woman). Moreover, the alleged discriminatory statement must bear some kind of connection to the adverse employment action. See, e.g., Cesaro v. Lakeville Cmty. Sch. Dist., 953 F.2d 252, 254 (6th Cir. 1992) (requiring that an employer's discriminatory comments be related to the ultimate adverse action).

Murphy claims several statements made by Hopkins constitute direct evidence that she was fired because she is a woman. First, Hopkins called an affirmative action meeting a "waste of time." However, this statement does not relate to the adverse employment action of firing Murphy. If anything, we find that this statement cuts against Murphy's claim because it shows a proclivity to judge each applicant on her merits, and not to provide a preference to, nor discriminate against, anyone in hiring.

Next, Murphy claims that Hopkins told Murphy "not to get fat like the last girl." Granted, we find this statement objectively rude and insensitive, but we find it offensive mainly to obese people, in general, and the former assistant in particular. This statement does not necessarily evidence a bias against women. And the singular use of the term "girl" does not constitute action sufficient to meet the standard for persistent or sever harassment. See Burlington Indus. v. Ellerth, 524 U.S. 742, 754, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)).

Lastly, Murphy presents Hopkins's statement that he hired Murphy because she was a woman while "good men were left begging for the job." This statement, if made, was made in connection with Murphy's hiring, not her firing. Accordingly, this statement fails as direct evidence of discriminatory intent in Murphy's dismissal under the proximity rule set forth in Cesaro.
In sum, we believe, even viewing the evidence in the light most favorable to Murphy, she has not shown direct or prima facie evidence of discrimination based on sex, but simply a personality conflict with Hopkins, which is not actionable. Accordingly, we affirm the summary judgment order below.

IV. Retaliation Claim

Murphy seeks a new trial because she believes the jury verdict on the issue of retaliation was against the manifest weight of the evidence. The district court denied the motion. We review denials of motions for a

new trial under an abuse of discretion standard. Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 675 (6th Cir. 2000).

Question # 1 submitted to the jury was "Did plaintiff Robin Murphy prove by a preponderance of the legal evidence that she opposed an employment practice which she in good faith believed to be unlawful discrimination?" The jury returned an answer of "no." Murphy now claims this answer is against the weight of the evidence. Murphy alleges that information contained in the trial record proves that the answer to this question must be "yes" because she had shown that she complained to the ombuds office, and that she cited sex-based discrimination in her complaints. However, Question # 1 specifically asked about the subjective factor of "good faith." Based on the evidence in the record, and as explained above, there is no evidence that indicates the existence of sex-based discrimination. Accordingly, it is not unreasonable that a jury might have found Murphy's allegations to be fabricated and not in good faith. Therefore, the district court did not abuse its discretion in finding that the jury did not return an answer against the manifest weight of the evidence.

Similarly, Question # 2 asked the jury, "Did plaintiff Robin Murphy prove by a preponderance of the legal evidence that the decision makers knew plaintiff had opposed an employment practice which she in good faith believed to be unlawful discrimination?" Again, this question contains the subjective factor of "good faith," and the answer returned was "no." Moreover, Hopkins expressly questioned Murphy's motivations in the letter he wrote to O'Dell requesting permission to

terminate Murphy. In the letter, he stated that "[Robin] introduced irrelevant issues (sexual discrimination has absolutely nothing to do with this situation)," thereby indicating he did not acknowledge that her complaint was made in good faith. Accordingly, we find it not against the manifest weight of the evidence that the jury answered "no" to Question # 2.

Moreover, Murphy argues that a new trial is warranted because the jury answers to Questions # 3-5 are inconsistent and show a degree of juror confusion. We have held that juror answers should be held irreconcilable only where there exists absolutely no way that they can be read together. See, e.g., Waggoner v. Mosti, 792 F.2d 595, 597 (6th Cir. 1986) (indicating that answers should be reconciled if at all possible). Here, the jury answered "no" to Question # 3, "Did plaintiff Robin Murphy prove by a preponderance of the legal evidence that plaintiff's opposition to an employment practice which she in good faith believed to be unlawful discrimination was a motivating factor in the decision of defendant to terminate her employment?" The jury answered "no" to Question # 4, "Did plaintiff Robin Murphy prove by a preponderance of the legal evidence that the reason given by defendant University of Cincinnati for her termination is a lie and a pretext for unlawful retaliation?" And lastly, the jury answered "no" to Question # 5, "Did defendant University of Cincinnati prove by a preponderance of the legal evidence that it would have terminated plaintiff's employment for legitimate nondiscriminatory reasons even if plaintiff had not opposed an employment practice which she in good faith believed to be unlawful discrimination?" Murphy contends that negative answers to Questions # 3 and # 5 are

inconsistent because if Murphy had not proved that her opposition to UC's practices was a reason for her firing, then UC must have proved that it had fired Murphy for nondiscriminatory reasons. Murphy's claim is without merit because Question # 5 shifts the burden of proof to UC. So, even if Murphy did not prove her case under Question # 3, it does not necessarily follow that UC proved its reasons under Question # 5. It is well within the range of possibility that neither side proved anything. Accordingly, there exist situations in which the answers are not inconsistent. Cf. Chesapeake & Ohio Ry. Co. v. Barnaby, 414 F.2d 309, 310 (6th Cir. 1969) (indicating that searching for inconsistencies runs afoul of the Seventh Amendment). Therefore, the jury responses do not reflect inconsistent answers or a lack of understanding by the jury that would warrant a new trial.

Murphy also claims inconsistency in Questions # # 6-8. In Question # 6, the jury concluded that Murphy was not entitled to back pay. In Question # 7, it concluded that UC proved that Murphy did not exercise diligence in mitigating her damages. Finally, in Question # 8, the jury concluded that Murphy's damages should be reduced by $ 18,500. These answers are not inconsistent if examined from the point of view that Murphy did not prove her case. If the jury found that Murphy did not properly mitigate, it is proper for it to determine the amount that Murphy could reasonably have been expected to mitigate in Question # 8. The jury concluded that she was expected to mitigate $ 18,500 (presumably through subsequent employment) and therefore her award should be granted only if the amount of damages exceeds that amount. Via Question # 6, damages were not awarded, rendering Question # 8

moot. But mootness in light of the negative answer to Question # 6 does not equate to inconsistency with that question.

Lastly, Murphy claims that the jury showed confusion warranting a new trial when it asked the district court for clarification of the standard of proof. At most, we find that a request for clarification evidences initial confusion which had presumably been remedied. Since the jurors did not elicit further clarification, we can only infer that the standard was understood and properly invoked. We find no evidence to suggest otherwise. Accordingly, we hold that there is no abuse of discretion, and Murphy's motion for a new trial was properly denied.

IV. Conclusion

For all the foregoing reasons, we AFFIRM the decision of the district court granting summary judgment to UC on the sex-based discrimination issue, and the jury verdict finding for UC on the retaliation issue.

CONCURBY: BOGGS

CONCUR: BOGGS, Circuit Judge, concurring. I concur in Judge Suhrheinrich's opinion, but I write separately to emphasize that even if Murphy could be deemed "qualified" for the position at the time of her firing (based on her original qualification and her possession of satisfactory objective qualifications), the district court would nevertheless have been correct in granting summary judgment to the University on her claim of gender discrimination.

Proceeding under the familiar burden-shifting approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), discussed at length in this opinion, Murphy must demonstrate under the fourth step that she was either replaced by a person outside her protected group, or was treated less favorably than a similarly situated male. Johnson v. University of Cincinnati, 215 F.3d 561, 572-73. Murphy was replaced by another female. And, as Judge Suhrheinrich ably demonstrates, at pp.8-9, she could not, to any reasonable juror, be considered similarly situated to the long-serving and nationally recognized diving coach.

DISSENT BY: CLAY

DISSENT: CLAY, Circuit Judge, dissenting. With respect to the majority's analysis of Murphy's prima facie claim of gender discrimination, I respectfully dissent. Pursuant to the Supreme Court's opinions in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1972) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981), a plaintiff can establish a prima facie case of discrimination by establishing that (1) she belonged to a protected class; (2) she received a discharge or suffered an adverse employment action; (3) she possessed the qualifications necessary for the position; and (4) a similarly-situated unprotected employee received better treatment. Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885-87 (6th Cir. 1996); Mitchell v. Toledo Hosp., 964 F.2d 577, 582-83 (6th Cir. 1992). The majority properly concludes that Murphy, as a woman, is a member of a protected class, see Dobbs-Weinstein v. Vanderbilt University, 185 F.3d 542, 544 (6th Cir. 1999), and that her firing was an adverse employment action, see Kocsis, 97 F.3d at 885-86. Since Murphy raised a genuine issue of material fact as to her qualifications and the relative treatment of a similarly-situated male, summary judgment was inappropriate.

An employee has the qualifications necessary for her position if she can perform (or performed) her job at a level that met the employer's legitimate expectations. McDonald v. Union Camp Corp., 898 F.2d 1155, 1160 (6th Cir. 1990). The majority proceeds to recite six different reasons why Murphy failed to meet Defendants' legitimate expectations: she (1) violated

NCAA rules; (2) challenged Hopkins' coaching technique; (3) challenged Hopkins' orders; (4) refused to perform those duties Hopkins gave her; (5) refused to make herself available as Hopkins required; and (6) failed to demonstrate improvement to Hopkins. Other than the NCAA violation, each alleged example of professional inadequacy depends on Hopkins' subjective evaluation.

Consider the NCAA violation first. Two weeks after she began working at the University. Murphy picked up a recruit from the airport and bought her a meal en route to campus. This violated NCAA regulations, although neither Hopkins nor the University chose to discipline Murphy for this apparently minor infraction. More important, Defendants have never contended that their decision to fire Murphy had anything to do with the NCAA issue. The "evaluation document" that the University provided Murphy gave reasons for her firing, but did not mention the NCAA violation. (Id.) The University justified its decision by describing Murphy's performance as "inadequate" based on her alleged refusal to perform assigned duties and disrespect for Hopkins' authority. (J.A. at 486.)

University officials, of course, got that idea from Hopkins, which raises the fundamental question of whether Hopkins' litany of grievances can provide a basis for summary judgment. The strength of the majority's conclusion depends on the strength of their ability to justify their decision to credit Hopkins' claims.

The majority implies that an employer can easily respond to a Title VII plaintiff's allegations by claiming

her job performance was unsatisfactory according to the employer's subjective criteria. Yet as we noted in an unpublished opinion, if courts applied an analysis based exclusively upon an employer's subjective evaluation, "most plaintiffs in discrimination cases will be barred from pursuing their claims before ever getting to the employer's conduct." McCrory v. Kraft Food Ingredients, 1996 U.S. App. LEXIS 26305, No. 94-6505, 1996 WL 571146, at *14 (6th Cir. Oct. 3, 1996).

The majority's effort to distinguish McCrory misses the crux of Murphy's position. They correctly explain that the plaintiff in McCrory "presented evidence of favorable reviews, awards, and commendations from his employer." McCrory could do this because he had worked at defendant Kraft Foods for thirty-two years. McCrory, 1996 U.S. App. LEXIS 26305, 1996 WL 571146 at *2. Under McCrory, courts should skeptically view a series of negative subjective evaluations that immediately precede a firing but follow many positive subjective evaluations. Unlike Murphy, however, the plaintiff in McCrory had the opportunity to develop years worth of positive subjective reviews.

McCrory's greatest relevance to the instant case is in reminding the Court to view subjective evaluations with healthy skepticism. See 1996 U.S. App. LEXIS 26305, [WL] at *4; see also McCullough v. Real Foods, Inc., 140 F.3d 1123, 1128 (8th Cir. 1998) ("Subjective criteria ... are particularly easy for an employer to invent in an effort to sabotage a plaintiff's claim and mask discrimination.") (quoting Thomas v. Denny's, Inc., 111 F.3d 1506, 1510 (10th Cir. 1997)). The majority's analysis dodges the key question, which is how Title VII law will handle situations in which the

alleged discrimination occurred so early in the plaintiff's employment that she never had the opportunity to accumulate favorable evaluations. n1

The majority's opinion gives employers carte blanche to discriminate against an employee as long as they downgrade her through subjective evaluations and fire her quickly. Even though an employer in such a situation has an obvious incentive to lie, the employee has no hope for redress as long as the person responsible for making the subjective evaluations is the same person who is discriminating. The majority claims that to decide otherwise would require "us [to] hold that once a woman is objectively qualified through proper training, licensure, or output requirements, she never be found unqualified, regardless of her actual performance." This is a ridiculous caricature of Murphy's position. It works by assuming the truth of the majority's conclusion--that no genuine issue of material fact exists as to whether Murphy performed adequately. I merely suggest that Murphy should have the chance to prove she performed adequately when the only evidence otherwise is Hopkins' own assertions. Numerous decisions have warned against blindly accepting subjective evaluations. See, e.g. McCullough, 140 F.3d at 1128 (8th Cir. 1998); Denny's, 111 F.3d at 1510; Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990) ("Subjective evaluations 'are more susceptible of abuse and more likely to mask pretext.'") (quoting Fowle v. C & C Cola, 868 F.2d 59, 64-65 (3d Cir.1989)); Miles v. M.N.C. Corp., 750 F.2d 867, 871 (5th Cir.1985) ("Subjective and vague criteria may be insufficient reasons given by an employer for its failure to rehire because such criteria do not allow a reasonable opportunity for rebuttal."); Grano v. Dep't of Dev. of

Columbus, 699 F.2d 836, 837 (6th Cir. 1983) (per curiam) (collecting cases).

The only other basis that the majority offers for its decision to reject Murphy's position and accept Hopkins' story is that, the majority claims, "Murphy does not dispute Hopkins' basic assertions that she refused to do what was asked of her." In her deposition, Murphy expressly testified that "I did everything that was asked of me." (J.A. at 436.)

When considering the majority's decision to accept Hopkins' account, it is also worthwhile to remember that--although no one corroborates Hopkins' reports that Murphy was an awful employee--two witnesses other than Murphy testified that Hopkins made disparaging comments about female workers. Murphy claims Hopkins said he was "upset" he had to hire her. (J.A. at 302.) According to Murphy, Hopkins told her "many qualified men ... were begging for this job but he was forced to hire a woman because of affirmative action." (Id.) Ann Bournett Kreiger, the woman who had previously held Murphy's job, also testified that Hopkins discussed with her how he had no choice but to hire a woman. n2 (J.A. at 378.) Chris Murphy, Plaintiff's husband, knew Hopkins from the local swim club. According to Chris Murphy, Hopkins said "women were unfit because of their gender and physiology to serve effectively in the military." (J.A. at 61.) Plaintiff's husband also reported that Hopkins made similar remarks about members of minority groups. (Id.) In fact, as Chris Murphy explained in his affidavit, Hopkins asked for his permission to hire his wife. (Id.) The majority's recitation of the facts fails to include any of this important testimony.

It is extraordinarily hard to accept that no genuine issue of material fact exists as to whether Murphy failed to meet Hopkins' legitimate expectations. To find for Murphy on this issue, a jury would merely have to decide to disbelieve Hopkins. When this Court engages in de novo review of summary judgment, we must remember to weigh all evidence in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). By choosing to adopt Defendants' entirely uncorroborated claims, the majority ignores the Supreme Court's instructions on the proper appellate review of summary judgment.

II.

The other disputed component of the McDonnell Douglas-Burdine test is whether a similarly-situated male employee received better treatment. See Kocsis, 97 F.3d at 885-87; Toledo Hosp., 964 F.2d at 582-83. The majority claims that Murphy failed to demonstrate "that she was treated worse than a similarly-situated male."

They err by interpreting the "similarly situated" requirement so strictly as to prevent individuals with unique jobs from ever establishing a prima facie case. n3 This Court has already rejected an attempt to require the "comparable" employee be identical to the plaintiff. See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998) (citing Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)). We reasoned that requiring a plaintiff to find someone identical would prevent plaintiffs in unique positions from ever establishing prima facie cases

without direct evidence. Id.

Murphy held a position at least somewhat comparable to that of the only other assistant swim coach, Charles Casuto, who coached the diving team. There are important points of similarity. First, both Murphy and Casuto held the position of "assistant swim coach." (J.A. at 460.) The majority's suggestion otherwise is incorrect, at least insofar as the respective positions are currently named. Second, Hopkins was responsible for supervising both Casuto and Murphy, and both Casuto and Murphy reported directly to Hopkins. Third, both Murphy and Casuto were covered by the identical job description that the Ombuds Office developed following Murphy's complaint. Prior to the development of the common written description, both Murphy and Casuto had very similar duties: both were responsible for coaching, transporting athletes to competitions, recruiting, evaluating athletes' performance, and completing practice logs.

Any reasonable observer would have to concede that Casuto had dramatically more experience than Murphy. Casuto had also accumulated various impressive accolades. It is possible, and perhaps even reasonable, that Hopkins treated Casuto better because of his substantial experience, not his gender. Nevertheless, Murphy established more than a "mere allegation" that Casuto's job has enough in common with hers to provide the jury with a meaningful basis for comparison. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Failing to interpret the prima facie requirement in such a manner as to render Casuto adequate for Murphy's purposes creates a situation in which Hopkins--and anyone with a

like role in another workplace--will have free reign to discriminate. The Supreme Court cautioned that the four-pronged McDonnell Douglas formula "was not intended to be an inflexible rule." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978). If the facts of a particular case make an inflexible application of the four-part test difficult, a plaintiff may establish a prima facie case by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under [Title VII]." Id. at 576 (quotation omitted). The majority chooses to apply precisely the sort of rigidity Furnco rejects.

As it now stands, this decision will make it easer for employers to avoid federal antidiscrimination law entirely in circumstances when (1) the employee's position is unique; (2) the discrimination and firing occurred before the employee had the opportunity to secure legitimate positive evaluations; and--most important--(3) when the employee's lone evaluator is himself the discriminator. The majority thus attempts to weaken Title VII jurisprudence.

III.

I also respectfully dissent from the portion of Part IIIB of the majority opinion which claims Hopkins' statement that affirmative action meetings are a "waste of time" is evidence against Murphy. The majority found that "this statement cuts against Murphy's claim because it shows a proclivity to judge each applicant on her merits, and not to provide a preference to, nor discriminate against, anyone in hiring." (emphasis in

original.) The majority's statement implies that someone opposed to affirmative action necessarily treats her employees in a truly color-blind and gender-neutral way. I have no doubt that members of the Klan and the American Nazi Party all think affirmative action is a "waste of time," but that belief would not reflect "a proclivity to judge each applicant on her merits."

I do not mean to suggest that people opposed to affirmative action are likely to discriminate--to draw that conclusion would be just as unfair as what the majority has done. Many people who oppose affirmative action still abide by the law and treats everyone fairly. Nevertheless, it defies logic to conclude that opposition to affirmative action necessarily indicates a preference for nondiscrimination.

For the aforementioned reasons, I respectfully dissent.

FOOTNOTES

n1 The majority also entirely fails to explain why Hopkins' opinions as to Murphy's subjective inadequacy implicate the prima facie analysis at all. The prima facie case is the first stage of the McDonnell Douglas-Burdine framework. Koesis, 97 F.3d at 885-87; Toledo Hosp., 964 F.2d at 582-83. In the second step, after a plaintiff establishes a prima facie case, the burden of production (though not the burden of persuasion) shifts and the defendant must offer legitimate reasons for its decision. In the third stage, the plaintiff has an opportunity to show that the employer's proferred reasons are a pretext for discrimination. "'Subjective' qualifications should be considered in the second and

third stages of the McDonnell Douglas/Burdine analysis." Fowle v. C & C Cola, 868 F.2d 59, 64 (3d Cir. 1989). See also Thomas v. Denny's Inc., 111 F.3d 1506, 1510 (10th Cir. 1997); Beinkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988); Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir.1985); Grano v. Dep't of Dev. of Columbus, 699 F.2d 836, 837 (6th Cir. 1983) (considering subjective evaluations at the second and third stage of the McDonnell process). It makes sense to evaluate subjective qualification assessments at the pretext stage because "subjective decision making provides an opportunity for unlawful discrimination." Burrus v. United Tel. Co., 683 F.2d 339, 342 (10th Cir. 1982).

n2 Krieger resigned after experiencing problems at work similar to those Murphy described.

n3 Judge Boggs' concurrence merely reiterates the majority's mistake. As the concurrence would have it, only those lucky few "long-standing and nationally recognized" diving coaches could ever state a Title VII claim. Contrary to that fallacious conclusion, Congress never awarded uniquely qualified individuals a license to discriminate.

C-1-97-276

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBIN J. MURPHY,
Plaintiff

v.

UNIVERSITY OF CINCINNATI, et al.,
Defendants

July 23, 1999

ORDER

This matter is before the Court upon the Report and Recommendation of the United States Magistrate Judge (doc. no. 2), plaintiff's objections (doc. no. 23), defendants' objections (doc. no. 24), defendants' response to plaintiff's objections (doc, no. 25) and plaintiff's response to defendants' objections (doc. no. 26). The Magistrate judge concluded that 1) plaintiff's equal protection claims under 42 U.S.C. § 1983 should be dismissed; 2) defendants are not entitled to qualified immunity; 3) this Court lacks jurisdiction over Count Four (state law claim); 4) plaintiff has failed to establish a prima facie case of sex discrimination; 5) this Court has jurisdiction of her retaliation claim; 6) plaintiff has presented sufficient evidence to establish the elements of her retaliation claim under Title VII, and 7) plaintiff has presented sufficient evidence to establish the elements of her retaliation claim under § 1983 against

Hopkins and O'Dell in their individual capacities. The Magistrate Judge therefore recommended that defendants' Motion for Summary Iudgment should be granted in part-and denied in part.

Plaintiff and defendants object to the Judge's Report and Recommendation on the ground that his findings are contrary to law. Plaintiff specifically objects to the recommendations of the Magistrate Judge dismissing his claims of discrimination on account of her gender. Defendant specifically objects to the recommendations of the Magistrate Judge denying summary Judgment on plaintiff's claims for retaliatory discharge.

Upon a de novo review of the record, especially in light of the parties' objections, the Court finds that the parties' objections have either been adequately addressed and properly disposed of by the judge or represent no particularized arguments that warrant specific responses by this Court. The Court finds that the Magistrate Judge has accurately set forth the controlling principles of law and properly applied them to the particular facts of this case and a agrees, with the Judge.

Accordingly, the Court hereby ADOPTS AND INCORPORATES BY REFERENCE HEREIN the Report and Recommendation of the United States Magistrate judge (doc. no. 22). Defendants' Motion for Surumary Judgment (doc. no. 16) is GRANTED IN PART AND DENIED IN PART.

The trial setting is CONFIRMED.

IT IS SO ORDERED.

Herman J. Weber, Judge
United States District Court

No. 01-3376

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBIN J. MURPHY,
Plaintiff-Appellant,

v.

UNIVERSITY OF CINCINNATI, ET AL.,
Defendants-Appellees.

September 30, 2003

ORDER

BEFORE: BOG, SUHRHEINRICH, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote an the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green,
Clerk

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

ROBIN B. MURPHY,

Petitioner,

v.

UNIVERSITY OF CINCINNATI, MONTY HOPKINS, GERALD O'DELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-97-276
(Weber, J.; Hogan, M. J.)

[Filed May 12, 1999]

Robin J. Murphy,	)
Plaintiff	)
	)
v.	)
	)
University of Cincinnati, et. al,	)
Defendants	)
	)

REPORT AND RECOMMENDATION

This matter is before the Court on the motion for summary judgment by defendants the University of Cincinnati (UC), Monty Hopkins, and Gerald O'Dell (Doc. 16), plaintiff Robin Murphy's memorandum in opposition (Doc. 18), and defendants' reply. (Doc. 19).

Plaintiff Robin Murphy brings this employment discrimination action against her former employer, the University of Cincinnati (UC), the Head Coach of Men's and Women's Swimming and Diving, Monty Hopkins, and the former UC Director of Athletics, Gerald O'Dell. Plaintiff claims that Hopkins discriminated against her on the basis of her sex, and that Hopkins and O'Dell eventually discharged her in retaliation for her complaints about the discriminatory treatment, in violation of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000e et. seq., 42 U.S.C. § 1983, and the Ohio Civil Rights Statute, Ohio Rev. Code § 4112 et seq. Specifically, plaintiff contends that Hopkins treated her less favorably than the Coach of UC's Diving team, Charlie Casuto, a similarly situated male who was also under Hopkins's supervision. Plaintiff also alleges that when she reported Hopkins's discriminatory treatment to the Ombudsman's Office at UC, she also met with O'Dell and reported Hopkins's conduct to him. Plaintiff claims that notwithstanding her complaints, O'Dell and Hopkins retaliated against her for reporting the discrimination by suspending her and then discharging her from employment less than a month after she reported the sex discrimination. Plaintiff seeks reinstatement or front pay, compensatory and punitive damages, as well as attorney's fees and costs.

Defendants move the Court for summary judgment as to all plaintiff's claims. Defendants contend that judgment is proper on plaintiff's claims against the individual defendants because: (1) neither Title VII nor Ohio Rev. Code § 4112 imposes individual liability on supervisors; (2) plaintiff's state law claims asserted against Hopkins and O'Dell are within the exclusive jurisdiction of the Ohio Court of Claims; therefore, this Court lacks jurisdiction over plaintiff's state law-claims; and (3) whether sued in their individual or official capacities, Hopkins and O'Dell are immune from suit under § 1983.

Defendants also contend that plaintiff's Title VII retaliation claim is barred for failure to-exhaust administrative remedies. Defendants argue that even if plaintiff's retaliation claim is not barred, she has failed to establish a prima facie retaliation case. As for plaintiff's discrimination claims, defendant argues that plaintiff cannot establish a prima facie sex discrimination case because she has failed to demonstrate that she was qualified for her position, subject to adverse action, or treated more favorably than a similarly situated male employee.

Predictably, plaintiff opposes the motion. First, plaintiff argues that the question of whether Title VII or Ohio law permits individual liability has not been resolved by the Supreme Court or the Ohio Supreme Court. Thus, plaintiff seeks to preserve her arguments on these issue for appeal. Second, plaintiff contends that while Hopkins and O'Dell may be entitled to immunity from a suit for money damages brought against them in their official capacities, plaintiff may obtain injunctive relief. Furthermore, according to plaintiff, these defendants are not entitled to qualified immunity on the claims against them in their individual capacities. Third, plaintiff argues that she has presented evidence sufficient to establish a prima facie case of both sex discrimination and retaliation, including evidence that she was subject to adverse action when Hopkins stripped her of all material coaching responsibilities, treated her less favorably than Casuto, and discharged her within a few weeks of registering discrimination complaints with UC's Ombudsman's Office. Plaintiff also claims that Hopkins discriminated in a similar manner against a former female assistant coach.

UNDISPUTED FACTS

Plaintiff Robin Murphy and defendant Monty Hopkins attended the same high school and swam for the same high school swimming coach. In the Summer of 1995, Hopkins was working as club manager of the Terrace Park, Ohio, Swim Club. Plaintiff was a member of the swim club after having recently moved with her family to Terrace Park. In July 1995, Hopkins informed plaintiff of an open position as Assistant Coach for Men and Women's Swimming with the University of Cincinnati, where Hopkins was the Head Coach. Plaintiff applied for the position and was hired to begin work on September 1, 1995, subject to a one year probationary period.

The parties agree that plaintiff and Murphy experienced problems in their working relationship almost immediately after plaintiff was hired. Plaintiff contends that Hopkins began treating her in "an objectionable manner" as soon as her first day of work. Defendant asserts that plaintiff failed to familiarize herself with the equipment and training manuals given to her by Hopkins when she was hired, and that within two weeks of starting her job she committed an NCAA rules violation. Hopkins and Murphy also had disagreements about the ratings of the swimmers, plaintiff's hotel accommodations at away meets, Hopkins's request that plaintiff drive the UC van and swim team members back from an away meet in Indiana, and a variety of other issues.

During the first week of November 1995, plaintiff met with Mitzie Cole of the University's Ombudsman's Office and complained about the treatment she was receiving from Hopkins. In addition to the issues mentioned above, plaintiff told Cole that Hopkins refused to introduce her to officials and coaches at away meets, did not keep her informed of

practice or workout schedule changes, did not accept her input about team lineups for meets, and told Cole that she felt she was being treated differently because she is a woman. Cole suggested that both plaintiff and Cole meet with O'Dell to discuss these issues. A meeting with O'Dell took place on November 6, 1995. Plaintiff related the same complaints discussed above to O'Dell. O'Dell told plaintiff he would look into her complaints and concerns.

Hopkins told O'Dell he found plaintiff to be inflexible and insubordinate for failing to adhere to his scheduling directives. With O'Dell's approval, plaintiff was placed on administrative leave on November 9, 1995, pending an investigation of her complaints. Hopkins simultaneously initiated the discharge process by completing an evaluation of plaintiff's performance dated November 7, 1995. On November 28, 1995, Hopkins and O'Dell met to discuss plaintiff's complaints, and O'Dell told Hopkins that plaintiff had complained to the Ombudsman's Office about sex discrimination. In early December, Cole initiated a meeting with Hopkins and Murphy to attempt to mediate their disputes. Hopkins, however, requested that O'Dell grant him permission to terminate the mediation process with Cole. On December 5, 1995, Hopkins met with Murphy to give her the November 7, 1995 written evaluation and to discuss an overview and summary of her perceived performance problems. Plaintiff responded to Hopkins's evaluation in writing on December 6, 1995. On December 8, 1995, with O'Dell's approval, plaintiff was terminated for insubordination. Plaintiff subsequently filed discrimination charges with the Ohio Civil Rights Commission (OCRC) on January 17, 1995.

DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD BE GRANTED IN PART

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex,* 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams,* 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgment motion. *McDonald v. Union Camp Corp.,* 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes v. Runyon,* 912 F. Supp. 280, 283 (S.D. Ohio 1995)(Spiegel, J.). "[A]fter a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting [one's own] earlier deposition

testimony." *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1352 (6th Cir. 1991).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson,* 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes,* 912F. Supp. at 283. *See also Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson,* 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted. *Street,* 886 F.2d at 1478 (citing *Celotex* and *Anderson).* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Plaintiff's § 1983 Claims against the University and Hopkins and O'Dell in their official Capacities are Barred on Immunity Grounds

The Eleventh Amendment to the United States Constitution bars a suit in federal court against a state or one of its agencies in the absence of the state's express consent to be sued or the unequivocal abrogation of the state's immunity by Congress. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy,* 113 S. Ct. 684 (1993); *Pennhurst State School &*

Hospital v. Halderman, 465 U.S. 89, 99-100 (1984); *Edelman v. Jordan,* 415 U.S. 651 (1974). The Eleventh Amendment bar extends to actions where the state is not a named party, but where the action is essentially one for the recovery of money from the state. *Edelman,* 415 U.S. at 663; *Ford Motor Company v. Dept. of Treasury,* 323 U.S. 459, 464 (1945). A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued as well. *Pennhurst,* 465 U.S. at 99. Thus, the fact that the state has waived immunity from suit in its own courts is not a waiver of its Eleventh Amendment immunity from suit in the federal courts. *Id.*

Plaintiff asserts § 1983 claims against the University of Cincinnati, a state university and therefore and arm of the state, as well as two university employees in their official capacities. Plaintiff does not dispute that defendant UC is an arm of the state. *See Nimmo v. Southern State Community College Case* No. C-1-83-738, (S.D. Ohio Nov. 19, 1985)(Rubin, J.)(citing *Hall v. Medical College of Ohio at Toledo,* 742 F.2d 299, 304 (6th Cir. 1984)). Clearly, plaintiff's equal protection claims asserted under 42 U.S.C. § 1983 against UC and Hopkins and O'Dell in their official capacities are claims for damages against the State of Ohio. While plaintiff concedes that such claims are barred, she asserts that she may pursue injunctive relief under § 1983. However, a review of plaintiff's amended complaint makes clear that she has not made a prayer for injunctive relief. *(See* Doc. 10, amended complaint, p. 7). Accordingly, these claims are barred by the Eleventh Amendment and should be dismissed for lack of jurisdiction.

The Individual Defendants Are Not Entitled to Qualified Immunity on Plaintiff's § 1983 Claims

State government officials generally are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Black v. Parke,* 4 F.3d 442, 444 (6th Cir. 1993)(quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Qualified immunity insulates government officials from individual liability for money damages. *See, e.g., Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992).

A constitutional right is "clearly established," thereby precluding the application of qualified immunity, if "the law [is] clear in regard to the official's particular actions in the particular situation." *Black,* 4 F.3d at 445 (quoting *Long v. Norris,* 929 F.2d 1111, 1114 (6th Cir.), *cert. denied,* 112 S.Ct. 187 (1991)). *See also Mackey v. Dyke,* 29 F.3d 1086, 1094 (6th Cir. 1994). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The official, therefore, will be immune if a state official of reasonable competence could disagree on whether the conduct violated plaintiffs rights. *Caldwell v. Moore,* 968 F.2d 595, 599 (6th Cir. 1992)(quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

Once a defendant raises a qualified immunity defense, the plaintiff must satisfy a two pronged analysis: (1) the allegations must state a claim for violation of a clearly established law; and (2) the plaintiff must present evidence sufficient to create a genuine issue of material fact as to whether a defendant in fact committed the acts alleged.

Williams v. Pollard, 44 F.3d 433,434 (6th Cir. 1995), *cert. denied,* 116 S.Ct. 69 (1995); *Adams v. Metiva,* 31 F.3d 375, 386 (6th Cir. 1994); *Russo v. Cincinnati,* 953 F.2d 1036, 1043 (6th Cir. 1992).

In the present case, plaintiff alleges that Hopkins discriminated against her on the basis of her sex and that Hopkins and O'Dell discharged her in retaliation for having reported the discrimination to the University's Ombudsman's Office. Defendants cannot seriously contend that plaintiff's right to be free from sex discrimination and retaliation is not a clearly established right of which a reasonable person would have known. Certainly O'Dell cannot be held liable for Hopkins's alleged discriminatory conduct, including Hopkins's alleged disparate treatment of plaintiff. *See O'Brien v. City of Grand Rapids,* 23 F.3d 990, 1000 (6th Cir. 1994). However, to the extent that plaintiff claims both Hopkins and O'Dell retaliated against her following her complaints to Mitzie Cole and her meeting with O'Dell, O'Dell may be liable if he authorized, approved, or knowingly acquiesced in unlawful retaliatory conduct. *See Hays v. Jefferson County,* 668 F.2d 869, 874 (6th Cir. 1982). Thus, if questions of fact exist to preclude summary judgment on plaintiffs discrimination or retaliation claims, the individual defendants will not enjoy qualified immunity with respect to those claims.

The Court Lacks Jurisdiction Over Plaintiff's State Law Claims

Count Four of plaintiff's amended complaint alleges sex discrimination under Ohio Rev. Code § 4112 et. seq.[1] In

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[1] The Court acknowledges that if it did not lack jurisdiction over plaintiff's state law claims for the reasons discussed *infra,* plaintiff would be entitled to pursue claims against Hopkins and

order to determine whether the Court can exercise supplemental jurisdiction over this claim, the Court must look to Ohio's civil rights statute to determine whether defendants have waived immunity from suit in federal court. In the present case, the answer is clear. Discrimination claims against the state brought pursuant to Ohio Rev. Code § 4112 are within the exclusive jurisdiction of the Ohio Court of Claims. *See Harris v. Ohio Dept. of Admin. Services,* 577 N.E.2d 1180 (Ohio Ct. App. 1989); Ohio Rev. Code §§ 2743.02(F) & 3361.01. While Ohio's Court of Claims Act serves to waive the state's immunity from suit, the State has the right to determine where such suits may be brought. *Pennhurst,* 465 U.S. at 99. Ohio has vested the Court of Claims with exclusive jurisdiction to hear suits for money damages against the state and state actors. Ohio Rev. Code § 2743.02. *See Freidman v. Johnson,* 480 N.E.2d 82, 84 (Ohio 1985). The State of Ohio has not constitutionally nor statutorily waived its Eleventh Amendment immunity in the federal courts. *See Johns v. Supreme Court of Ohio,* 753 F.2d 524 (6th Cir. 1985), *cert. denied,* 474 U.S. 824 (1985); *State of Ohio v. Madeline Marie Nursing Homes,* 694 F.2d 449 (6th Cir. 1982). Thus, Ohio has not waived its immunity from such suits in a federal forum. In the present case, there are no allegations in the complaint that defendants Hopkins or O'Dell were acting outside the scope of their employment or in any capacity other than as employees of the University when plaintiff was allegedly discriminated against and terminated because of her sex. Thus, Count Four alleges nothing more than a claim for money damages against the state and state

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O'Dell based on individual supervisor liability under Ohio Rev. Code § 4112. *See Genaro v. Central Transport, Inc.,* 84 Ohio St. 3d 293, 703 N.E.2d 782 (1999).

actors. For the foregoing reasons, this Court lacks jurisdiction and Count Four should be dismissed.

By contrast, the Court does have federal question jurisdiction over plaintiff's federal sex discrimination claim. This claim is not subject to the limitations imposed by the Eleventh Amendment because Ohio's immunity from suit in federal court under this statute has been abrogated. Thus, plaintiff's Title VII claim will not be dismissed on Eleventh Amendment grounds.

Plaintiff Has Failed to Establish A Prima Facie Sex Discrimination Case

Plaintiff claims that Hopkins discriminated against her by stripping her of all material responsibilities as Assistant Swimming Coach and by treating her less favorably than Coach Casuto. Plaintiff claims that examples of Hopkins's discriminatory and disparate treatment leading up to her suspension and eventual discharge include: (1) being embarrassed, humiliated, and "treated like a nobody"; (2) being ordered off the pool deck and directed to stand in the hallway during swim practice; (3) having Hopkins change practice or workout schedules without consulting her; (4) being required to perform physical labor such as sanding and repainting equipment; (5) failing to introduce her to coaches or officials at swim meets; (6) instructing her to drive a UC van back to campus from an away meet without prior notice; (7) calling her "stupid"; (8) telling her that a swimmer was exhibiting improper form by "sticking her but up in the air again"; (9) telling her she was parking in his parking space; and (1) suggesting that she "better exercise" so she would not "get fat" like the last girl [i.e. the previous Assistant Coach]." According to plaintiff, these incidents are evidence of discrimination because Hopkins either did not or

would not have treated Casuto in a similar manner. Plaintiff also claims that Hopkins told her before she was hired that because of Title IX, he was being forced by O'Dell to hire a woman as Assistant Coach over male coaching candidates whom he preferred. Plaintiff also claims that Hopkins told her he could avoid having to hire a woman in the future by eliminating the Assistant Coach position.

Defendants contend that while plaintiff appeared qualified before she was hired, her performance did not meet Hopkins's legitimate expectations; therefore, she was not qualified for her position. Defendants also contend that plaintiff did not suffer any adverse action prior to her termination. Finally, defendants argue that plaintiff has failed to demonstrate that she was treated less favorably than similarly situated males because Coach Casuto is not a proper comparable.

Under Title VII, a plaintiff may establish a *prima facie* case of disparate treatment by showing either direct or indirect evidence of discrimination. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). A plaintiff alleging disparate treatment sex discrimination may establish a *prima facie* case through the following circumstantial evidence: (1) she is a member of the protected class; (2) she was performing her job satisfactorily; (3) she was subject to an adverse employment action; and, (4) she was replaced by someone outside the protected class. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994). However, the aforesaid test is not the only way to establish a *prima facie* discrimination case. *McDonnell Douglas,* 411 U.S. at 802. Plaintiff may also raise an inference of discrimination by presenting evidence that defendant treated her less favorably than similarly situated

male employees. *International Brotherhood of Teamsters v. U. S.*, 431 U.S. 324, 335-36 n. 15 (1977); *Mitchell,* 964 F.2d at 582-83. In other words, the plaintiff must show that sex was a determining factor in the adverse action the employer took against her. *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991). The employer is entitled to judgment if the plaintiff does not establish a *prima facie* case. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-84 (6th Cir. 1992).

In the present case, it is undisputed that plaintiff is a member of the protected class. The parties dispute whether plaintiff was qualified for her position, whether she was subject to adverse action, and whether she was treated less favorably than a similarly situated male. For the reasons set forth more fully below, the Court finds that plaintiff fails to establish the elements necessary to support a prima facie case of sex discrimination.

1. Qualified for the Position

Defendants assert that plaintiff was terminated for lack of flexibility in assuming work assignments and insubordination. In response to defendants' assertion that plaintiff was not meeting Hopkins's expectations, plaintiff argues that his expectations were neither legitimate nor reasonable. Plaintiff does not dispute that she failed to follow Hopkins's directives with respect to working with a swimmer; rather, plaintiff argues that Hopkins's request was unreasonable because she did not know when the swimmer would arrive and left only after waiting for him. Plaintiff also relies on her qualifications at the time she was hired and Hopkins's deposition testimony that she was the best candidate for the job in support of her claim that she was qualified for the Assistant Coach position.

In order to show that plaintiff was qualified, she must demonstrate that she was performing her job at a level which met her employer's legitimate expectations. *Ang v. Procter & Gamble Co.*, 92 F.2d 540, 548-49 (6th Cir. 1991)(quoting *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir. 1990)). If plaintiff fails to meet her employer's reasonable expectations, she cannot raise an issue of fact as to the quality of her work merely by challenging her supervisor's judgment. *Id.* The *Ang* Court found that the plaintiff's history of poor performance, when coupled with the diversion of his attention away from his job responsibilities to his discipline for violating company confidentiality, rendered him "not qualified." Similarly, the *McDonald* Court found the plaintiff was not qualified, where he acknowledged that his supervisors were dissatisfied with his performance at the time of his discharge. 898 F.2d at 1160. Title VII is not a vehicle for reviewing what plaintiff may deem to be a bad business decision or for questioning the soundness of her employer's judgment. *Id.* Thus, an employer may make a subjective decision to discharge an employee for any reason, so long as the decision is not based on discriminatory motive or intent. *Ackerman,* 670 F.2d at 70.

The evidence is undisputed that plaintiff disagreed with Hopkins on coaching decisions, committed an NCAA rules violation, challenged Hopkins's authority to make scheduling and workout plan changes without consulting her, complained about being asked to perform equipment maintenance and repair, objected to the time commitment required of her by Hopkins, and failed to familiarize herself with certain equipment within the time period expected by Hopkins. The evidence is also undisputed that Hopkins was dissatisfied with plaintiff's performance. Plaintiff cannot raise an issue of fact merely by challenging Hopkins's judgment and arguing that his expectations were unreasonable. *McDonald,* 898 F.2d at

1160. Plaintiff's subjective belief that Hopkins wanted her to work longer hours than her salary commanded or that she should have been part of the decision-making process with respect to workout, practice schedules, and swimmer rankings is merely an attempt to challenge defendant's business judgment. For these reasons, plaintiff has failed to demonstrate that she was performing satisfactorily at the time of her discharge and therefore has failed to demonstrate that she was qualified for her position.

2. Adverse Action

It can hardly be disputed that plaintiff's discharge was an adverse employment action. However, plaintiff claims that she was subjected to "other forms of material adverse job action" prior to her discharge. Plaintiff argues that she was embarrassed, humiliated, and treated "like a nobody" and that she "didn't have any job responsibilities as far as specific tasks." Plaintiff claims that defendant Hopkins did not allow her perform all the duties listed in the job description she obtained after she contacted the Ombudsman's Office; rather, she was assigned "nominal" duties, required to "stand idly" next to Hopkins during swim meets, and ordered off the pool deck at one point. According to plaintiff, this treatment significantly diminished her material responsibilities and constituted adverse employment action.

In order to show that she suffered an adverse employment action, plaintiff must demonstrate that Hopkins's actions about which she complains were a "materially adverse" change in the terms of her employment *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996). Generally, reassignments without salary or work hour changes do not ordinarily constitute adverse employments decisions. *Id.* (citing *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir.

1987)). To determine whether an employment action is adverse, the Court may consider factors such as whether plaintiff was subject to termination of employment, or a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation, *Id.* at 886. Moreover, a change in employment conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. *Id.* (referring with approval to *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)). When pay and benefits remain the same, generally a change in job title or a "bruised ego" are not enough to support a claim of adverse action. *Id.* at 885-86. *See also Vannoy v. OCSEA Local 11*, — F. Supp.2d— , 1999 WL 101237, *4 (S.D. Ohio Feb. 23, 1999)(Marbley, J.).

In the instant case, plaintiff did not experience any loss of wages or any change in benefits during the course of her employment as the Assistant Coach for Men and Women's Swimming. Plaintiff was not transferred, demoted, nor was her job title changed. Rather, acting as her Supervisor and the Head Coach, Hopkins removed her from performance of certain duties during her probationary employment period because she was not performing them to his satisfaction. At most, plaintiff's allegations lead to the conclusion the Hopkins was somewhat gruff, dictatorial, or insensitive in his managerial style. However, plaintiff has failed to demonstrate that changes he made in her employment were anything more than a mere inconvenience or an alteration of job responsibilities. *Kocsis,* 97 F.3d at 886. Thus, plaintiff fails to demonstrate that she was subject to adverse employment action prior to her suspension and discharge.

3. Similarly Situated

In support of her sex discrimination claim, plaintiff alleges that she was treated less favorably than Coach Casuto. According to plaintiff, she and Casuto are similarly situated because they are both Assistant Coaches, supervised by Hopkins. Plaintiff asserts that Casuto is permitted to set his own practice and workout schedule, drive his own car to away meets, and manage his diving team members. Plaintiff also claims that Casuto was not required to perform equipment maintenance or attend team meetings.

Where plaintiff seeks to establish a prima facie sex discrimination claim based on the assertion that she was treated differently than similarly situated male employees, plaintiff bears the burden of proof with respect to the issue of comparability. *Creech v. Ohio Casualty Insurance Co.,* 944 F. Supp. 1347, 1354 (S.D. Ohio 1996)(Beckwith, J.). In order to establish that the person with whom plaintiff seeks to compare herself is similarly situated, plaintiff must demonstrate that the she and the comparable employee are similarly situated "in all relevant aspects." *Pierce v. Commonwealth Life Ins. Co.,* 40 F.3d 796, 802 (6th Cir. 1994). In cases involving allegations of discriminatory discipline resulting in termination, the Court may consider factors such as whether plaintiff and the alleged comparable dealt with the same supervisor, were subject to the same standards, and engaged in substantially comparable conduct. *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir. 1998)(citing *Mitchell,* 964 F.2d at 582). A plaintiff is subject to the same standards of performance and discipline as the proposed similarly situated employee where the plaintiff and the comparable employee have sufficiently similar duties and responsibilities. *Noland v. Lorain Board of Education,* 869 F. Supp. 529, 531 (N.D. Ohio 1994), *affd,* 70

F.3d 115 (6th Cir. 1995). However, these are not the only factors which a court should consider in determining whether a non-protected employee is similarly situated; rather, the Court must make an independent determination as to the relevancy of a particular aspect of plaintiff's employment status and that of the comparable. *Ercegovich,* 154 F.3d at 352. As the Court explained in *Mitchell,* the individuals with whom plaintiff seeks to compare herself must be similarly situated, "without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." 964 F.2d at 583.

It is undisputed that Casuto did not receive a copy of his job description until after plaintiff reported her allegations of discrimination to the Ombudsman's Office. While plaintiff claims that according to the written description her job and Mr. Casuto's jobs were on par, that assertion is belied by the evidence. Casuto has been coaching diving for over thirty years, and has been coaching at UC for over twenty years, while plaintiff had no collegiate coaching experience at the time she was hired by UC. The evidence is undisputed that Hopkins was not involved in any day-to-day' coaching responsibilities for the diving team and did not control Casuto's work or practice schedule, coaching, or recruiting efforts. The evidence is also undisputed that Casuto has driven team members to away meets in the University van and regularly performs physical labor as part of routine diving team equipment maintenance. As defendant noted, plaintiff's recitation of the facts in support of her claim that Casuto was treated more favorably supports this Court's finding that Casuto and plaintiff are not proper comparables. Moreover, even if they were similarly situated, there is no evidence that Casuto challenged Hopkins's authority to set workout and practice times for the swimmers or refused to perform any task assigned by Hopkins. Therefore, plaintiff and Casuto

were neither subject to the same standards nor did they engage in comparable conduct.

For the foregoing reasons, the Court finds that plaintiff was not qualified for her position, subject to adverse action, or treated more favorably than a similarly situated male employee. Because plaintiff cannot establish a prima facie case with respect to her Title VII sex discrimination claims, summary judgment should be granted in defendants' favor on this claim.

Plaintiff's Title VII Retaliation Claim is Not Barred for Failure to Exhaust Administrative Remedies

Defendants argue that plaintiffs Title VII retaliation claim should be barred for failure to exhaust administrative remedies. Defendants assert that plaintiffs OCRC charge fails to allege retaliation. Defendants further contend that plaintiffs retaliation claim is not reasonably expected to grow out of her charge alleging disparate treatment sex discrimination. Plaintiff claims that she filed her initial charge pro se and that the OCRC did not advise her of her rights with respect to Title VII's retaliation provisions. However, plaintiff specifically raised the issue of retaliation in letters that she sent to the OCRC on February 22, and April 29, 1996. In addition, plaintiff expressly raised the issue of retaliation with the OCRC when she appealed the Commission's finding of no probable cause by letters dated August 14 and 19, 1996. Plaintiff argues that her retaliation claim should not be barred because it was clearly raised in the administrative proceedings below. Defendants counter that plaintiffs April 29, 1996 letter is inadmissible because there is no stamp indicating that is was ever received by the OCRC and it was neither produced by the OCRC in response to defendants' FOIA request, nor listed in the privilege log as a document in plaintiff's file

withheld from production. Defendants contend that because plaintiff failed to properly raise a retaliation claim, they were unable to participate in any conciliation process with respect to such a claim and therefore the claim should be barred.

In order for the Court to have jurisdiction over plaintiff's Title VII claims, plaintiff must first pursue administrative relief. *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 545 (6th Cir. 1991); *Cameron v. Bd. of Educ. of the Hillsboro, Ohio, City School Dist.*, 795 F. Supp. 228, 234 (S.D. Ohio 1991)(Spiegel. J.). While the timely filing of a charge with the OCRC or EEOC is not itself a jurisdictional prerequisite, if a claimant does not first present her claim to the OCRC or EEOC, she may not bring that claim in federal court. *Ang*, 932 F.2d at 545. The purpose behind this rule is to trigger the investigatory and conciliatory procedures and enable the Commission to attempt to obtain voluntary compliance with the law. *Davis v. Sodexho, Cumberland College Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998). However, in this Circuit, the charge filing requirement has been expanded so that the judicial complaint is limited to "the scope of the [administrative] investigation reasonably expected to grow out of the charge of discrimination.'" *Id.* (internal quotations omitted). *See also Ang*, 932 F.2d at 545; *Cameron*, 795 F. Supp. at 234. One reason for expanding the filing requirement is because charges are frequently filed by lay complainants. *Davis*, 157 F.3d at 463. The courts recognize that subsequent judicial actions should not be restricted by the lay person's failure to attach the correct legal conclusion to the charge or failure to include the exact wording which might be required in a judicial proceeding. *Id.* Therefore, when the EEOC or OCRC investigation of a charge in fact reveals that there is evidence of a different type of discrimination, a lawsuit based on the newly understood claim will not be barred for failure to exhaust administrative remedies. *Id.* (citing *Sanchez v.*

Standard Brands, Inc., 431F.2d 455,466(5th Cir. 1970)). Likewise, where facts related with respect to the charged claim would prompt the Commission to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on such a claim, *Id.*

In the present case, the Court finds that plaintiff should not be precluded from bringing suit on her retaliation claim. The Court agrees with defendants that the OCRC charge filed on January 17, 1996, does not include a claim of retaliatory discharge. However, plaintiff received at least two letters dated January 23, 1996, from Will E. Johnson, the OCRC investigator assigned to her case, in which Johnson directed her to inform him of "any new information that would be beneficial in resolving the issues." (Doc. 19, Canton Aff., Exs. E & F). In response, plaintiff wrote Johnson a letter discussing the facts of her case and stating:

> One fact that I would also like to point out is that because [the former Assistant Coach] did not complain to anyone and took the treatment she was subjected to, she was able to keep her job for an extended period of time. On the other hand, I sought assistance from the proper arbitration channels, and was consequently fired.

(Doc. 18, Murphy Aff., Ex. B)(emphasis in original). This letter clearly contains factual allegations which should have alerted the OCRC investigator that there were facts related with respect to the charged claim which would prompt the Commission to investigate a different, uncharged claim, namely retaliatory discharge. *Davis,* 157 F.3d at 463. Thus, even if as defendants allege, they did not receive a copy of the April 29, 1996 letter until it was attached to plaintiff's memorandum in opposition to summary judgment, the

February 22, 1996 letter should have put the Commission and other interested parties on notice that plaintiff believed that she was terminated in retaliation for reporting sex discrimination to the Ombudsman's Office. Plaintiff filed her charge pro se and followed up with letters in response to Johnson's requests for additional information. Plaintiff continued to address the issue of retaliation even though the investigator did not. Plaintiff even raised the issue during her administrative appeal but the OCRC never squarely addressed it. The fact that the Commission failed to investigate plaintiff's allegations of retaliation, which were brought forward after she filed a pro se charge but before the charge was subject to fact finding, should not bar her from pursuing a judicial complaint based on her alleged retaliatory discharge. Consequently, the Court must determine whether plaintiff has stated a prima facie retaliation claim.

Summary Judgment Should be Denied as to Plaintiffs Title VII Retaliation Claim

To sustain a retaliation claim, proof of discriminatory motive is crucial. *Rowe v. Cleveland Pneumatic Co., Numerical Control Inc.*, 690 F.2d 88, 92 (6th Cir. 1982). In order establish a retaliation claim, plaintiff must prove that: (1) she engaged in protected activity; (2) defendant knew that plaintiff engaged in such activity; (3) plaintiff suffered an adverse employment action; and (4) a causal connection exists between plaintiff's protected activity and the adverse employment action taken by defendant. *E.E.O.C.v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990), *cert. denied,* 498 U.S. 984 (1990); *Polk v. Yellow Freight System,* 876 F.2d 527(6th Cir. 1989). A plaintiff may demonstrate the requisite causal connection by demonstrating disparate treatment, or by showing that defendant's adverse

action closely followed plaintiff's protected activity. *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir. 1986), *cert. denied,* 478 U.S. 1006 (1986); *Wrenn v. Gould,* 808 F.2d 493, 501 (6th Cir. 1987). Assuming plaintiff establishes a prima facie discrimination case, defendants must articulate a legitimate nondiscriminatory reason for the adverse action taken. If defendants meet their burden, plaintiff's claim will be dismissed on summary judgment unless she can show that defendants' articulated reason for their actions is merely pretext for unlawful retaliatory conduct.

In the present case, it is undisputed that plaintiff registered a complaint with the Ombudsman's Office concerning the treatment she was receiving from Hopkins. It is also undisputed that Mitzie Cole from the Ombudsman's Office attempted to facilitated a mediation session between Hopkins and plaintiff and that Hopkins requested to terminate the session after several hours. Furthermore, it is undisputed that plaintiff also met with O'Dell and expressed her concerns regarding Hopkins's treatment of her. O'Dell told plaintiff he would "look into" her complaints. While defendants argue that plaintiff never explicitly stated to either Cole or O'Dell that she was being subjected to *discriminatory* treatment, she claims that she did make such a complaint. There is at least an issue of fact as to whether plaintiff engaged in protected activity. Title VII's retaliation provisions do not require plaintiff to use any magic words when registering complaints of discrimination in order to come within the purview of the statute's protections. Moreover, Hopkins and O'Dell were both certainly aware that plaintiff had gone to the Ombudsman's Office. Finally, it is undisputed that plaintiff was subject to adverse action when she was discharged from her employment as an Assistant Swimming Coach. Approximately three weeks after plaintiff's complaints to the

Ombudsman's Office and her meeting with O'Dell, plaintiff was placed on administrative leave. Approximately one week later, without ever responding to plaintiff concerning her complaints, O'Dell approved Hopkins's recommendation that plaintiff be terminated. Thus, plaintiff has come forward with evidence sufficient to satisfy the prima facie elements of a retaliation claim.

Defendants assert that plaintiff was terminated for insubordination. While plaintiff admits that she failed to complete a task assigned by Hopkins, she argues that insubordination was not the real reason for her discharge. The Court finds that question of fact exist on the issue of pretext which preclude summary judgment. As set forth *supra,* plaintiff was not qualified for her position because she was not performing up to Hopkins's expectations. However, plaintiff was not terminated for poor performance. There is a question of fact as to whether insubordination was the real reason for her discharge when there is evidence that Hopkins did not want to hire a woman assistant, plaintiff only failed to carry out an assigned duty on one occasion, Hopkins terminated mediation with plaintiff and Cole, and Hopkins recommended that plaintiff be terminated only after she complained to the Ombudsman's Office and the Athletic Director. For these reasons, defendant's summary judgment motion should be denied as to plaintiff's Title VII retaliation claim. Because the Court recommends denying the motion with respect to plaintiff's Title VII retaliation claim, defendants' motion should also be denied with respect to plaintiff's retaliation claim asserted under § 1983 against defendants Hopkins and O'Dell in their individual capacities.

IT IS THEREFORE RECOMMENDED THAT:

Defendants' summary judgment motion (Doc. 16) be GRANTED IN PART and DENIED IN PART.

Date: May 11, 1999 /s/_____
Timothy S. Hogan
United States Magistrate Judge

(3)

Supreme Court, U.S.
FILED
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No. 03-999

In The Supreme Court Of The United States

ROBIN B. MURPHY,

Petitioner,

v.

UNIVERSITY OF CINCINNATI, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

At most, this case would be a garden-variety Title VII case, involving the application of settled law to one factbound scenario in an unreported case below. But in fact, this case actually involves *less* than a garden-variety Title VII case, for—contrary to the misimpression in the Petition—this case does not even involve a standard sex-based termination claim.

As detailed below, Petitioner Murphy brought two narrowly-crafted Title VII counts against Respondent University of Cincinnati, and neither count alleged that she was fired because of her sex. Rather, her sex-discrimination count alleged that she received discriminatory treatment, based on her sex, in the *terms and conditions* of her employment *while on the job*, and that count deliberately and carefully excluded any claim that her firing was sex-based.

Separately, she alleged, in her "termination count," that she was fired *in retaliation for* complaining about discrimination. She was careful in her Amended Complaint to link her firing to that alleged retaliatory motive, not to core sex discrimination. A jury rejected the retaliation claim, and that claim is no longer at issue.

Because Murphy has no discriminatory-firing claim, her Petition is fatally flawed in several respects. Two of her Questions Presented are not truly presented, as they rely on the existence of a non-existent termination claim. And if the questions are considered in the context of a "terms and conditions" claim, this is a flawed case to consider those questions. That is so for several reasons, including that Murphy suffered no adverse employment action, once the firing is properly taken off the table.

Moreover, even if the Court treats this case as a discriminatory termination case, the Petition does not warrant review. The Petition does not raise any issues worthy of review, and even if some issues are interesting, this case is a poor vehicle to review those issues. For example, her case is not a good vehicle to determine what type or level of evidence amounts to sufficient "direct evidence" of discrimination, as her allegations are a weak bundle that would lose under any standard. The Petition's other issues suffer similar flaws.

For these reasons and others detailed below, the Petition should be denied.

COUNTERSTATEMENT

Petitioner Robin Murphy, a former assistant coach of the University of Cincinnati swim team, filed an amended complaint on October 15, 1997, against the University of Cincinnati (a state university), head swim coach Monty Hopkins, and former athletic director Gerald O'Dell.[1]

Murphy's Amended Complaint contained two Title VII claims—a sex-based "terms and conditions" claim, and a retaliatory-termination claim—but it did not allege that she was fired because of her sex. Her first paragraph, labeled a "Preliminary Statement," explained her two distinct claims, alleging that

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[1] While Murphy names the University and both individuals as Respondents, the only proper Respondent to the Title VII claims is the University. Murphy cites Section 1983 once in her Petition, but does not say anything to revive her Section 1983 claims against the individuals. Nevertheless, to the extent the Petition seeks to revive claims against the individuals, the term "University" is intended to refer to all Defendants-Respondents together.

> Defendants discriminated against her with respect to the *terms and conditions* of her employment as Assistant Coach for the University of Cincinnati Swim Team. More specifically, Defendants discriminated against Plaintiff by treating her in a derogatory manner because she is a woman, subjecting her to *terms and conditions* of employment different than similarly situated males, and *terminating her for protesting said discrimination.*

Amended Complaint ("Am. Compl.") ¶ 1 (emphasis added).

Murphy's statement in support of federal jurisdiction further confirmed that she raised these two distinct claims, but not a standard sex-based termination claim. She said that federal jurisdiction was "conferred by: (1) Title VII, 42 U.S.C. § 2000e *et seq.*, as amended by the Civil Rights Act of 1991, which prohibits discrimination in the *terms, conditions, or privileges* of employment *and prohibits retaliation* for participation in protected activities." Am. Compl. ¶ 2 (emphasis added). This jurisdictional statement omitted noting that Title VII, of course, makes it unlawful to "discharge any individual" based on sex. *See* 42 U.S.C. § 2000e-2.

The complaint's factual section, labeled "Statement of Claims," further continued to carefully delineate between the sex-based terms-and-conditions claim, and the retaliatory-termination claims. Paragraph 12 alleged that Murphy was subjected to "discriminatory treatment based on her sex," and that paragraph listed eight examples of such discriminatory treatment, including several allegations of harsh comments and general "mistreatment." While that paragraph included standard language that the discrimination

"included, but was not limited to" those examples, the list did not mention Murphy's firing, which was discussed elsewhere in the complaint. Paragraph 13 alleged that coach "Hopkins did not subject male assistant coaches to any of the unfair and discriminatory terms and conditions of employment to which he subjected Plaintiff."

Murphy's factual allegations next turned from the sex-based terms and conditions claim to the retaliatory-firing claim. Paragraph 14 alleged that she complained to University officials about her mistreatment, and Paragraph 15 alleged that she was fired. She alleged that the University "terminated Plaintiff in retaliation for Plaintiff complaining" about her alleged mistreatment.

Murphy's narrowly-defined legal counts, following her factual allegations, further confirmed her approach. Count One alleged a "violation of Plaintiff's rights to be free from discrimination in the terms, conditions, and opportunities for employment on account of her sex," but it did not mention the well-known terms of "discharge," "firing," or "termination." Am. Compl. ¶19. Count Two alleged a "violation of Plaintiff's right to be free from retaliation." *Id.* ¶21. Count Three, a Section 1983 claim, and Count Four, a state-law discrimination claim, both repeated Count One's language regarding terms, conditions, and opportunities in her employment. *Id.* ¶¶23, 25.

The District Court—both the Magistrate Judge and the District Court judge—treated the sex-discrimination claim as purely a non-firing terms-and-conditions claim, and granted the University summary judgment against that claim. Pet. App. 30a; Pet. Supp. App. 20a. The Magistrate found, and the district court agreed, that Murphy failed to establish three of the four elements necessary to establish a prima facie case of sex discrimination. *Id.*

Specifically, the Magistrate found that Murphy did not suffer an adverse employment action, *with regard to her terms and conditions claim* (the only claim at issue here), because the pre-firing "terms and conditions" allegations did not amount to a concrete adverse action. The Magistrate acknowledged that it could "hardly be disputed that plaintiff's discharge was an adverse employment action." Pet. Supp. App. 16a. But, because her claim was not a discriminatory termination claim, the Magistrate could not stop there. Instead, he looked to Plaintiff's "claims that she was subjected to 'other forms of material adverse job action' prior to her discharge." *Id.* The Magistrate concluded that Murphy did not satisfy the adverse-action prong for the terms and conditions claim, explaining that "[a]t most, plaintiff's allegations lead to the conclusion [that] Hopkins was somewhat gruff, dictatorial, or insensitive in his managerial style. However, plaintiff has failed to demonstrate that changes he made in her employment were anything more than a mere inconvenience or an alteration of job responsibilities." *Id.* 17a.

The Magistrate also found that Murphy was not qualified for her job, and that she was not treated less favorably than any similarly-situated male. *Id.* 20a. Accordingly, the Magistrate found that Murphy's retaliatory-firing claim should go to trial, but without any sex-discrimination claim. *Id.* 25a.

The District Court adopted and incorporated by reference the Magistrate's Report and Recommendation, stating, "the Magistrate Judge has accurately set forth the controlling principles of law and properly applied them to the particular facts of this case." Pet. App. 29a-30a.

Murphy's retaliatory-firing claim was then tried before a jury. The jury returned special verdicts in favor of the University, and the District Court found that the jury's

special verdicts were not against the clear weight of the evidence. The District Court denied Murphy's motion for a new trial. *Id.* 4a; Pet. 6.

The Sixth Circuit affirmed the District Court's decision granting summary judgment against Murphy's sex-discrimination claim. Pet. 17a. The Sixth Circuit also ruled that the District Court did not abuse its discretion when it denied Murphy's motion for a new trial on the retaliation claim. Murphy's petition for rehearing and suggestion for rehearing en banc was denied. Pet. 7.

The Sixth Circuit agreed with the District Court that Murphy failed to show that she was qualified, as she did not ever satisfy her employer's expectations. Pet. App. 10a. The court also agreed with the District Court that Murphy failed to show that she was treated differently from any similarly-situated male; the appeals court agreed that Assistant Coach Charlie Casuto was not comparable to Murphy. *Id.*

The panel seems to have simply (but incorrectly) assumed, however, that Murphy challenged her firing as part of her sex-discrimination claim. *Id.* 6a. The panel did not mention the District Court's finding that Murphy had not suffered any adverse action, nor did it mention that the Defendants challenged the existence of adverse action. Instead, the panel merely stated in passing that "being fired constitutes an adverse employment action," and it went on to address the other prongs of the prima facie test. Pet. App. 6a-7a. The parties had both briefed the adverse action issue, but the court did not discuss that dispute. Because discussion of the parties' briefs inherently requires more argumentative characterization of the dispute, that discussion is reserved for Part I of the argument below.

As detailed below, although she had presented only a retaliatory-termination claim, and not a discriminatory-

termination claim, Murphy's Petition centers almost entirely on a claim that she was fired because of her sex. Her Questions Presented, for example, refer to an alleged "link between the termination and gender," and to the "individual who terminated her employment." Pet., Questions Presented. Her Petition does not seek to revive the retaliation claim.

REASONS FOR DENYING THE WRIT

For several reasons, this case does not warrant the Court's review. First, Murphy did not pursue a discriminatory-firing claim in the District Court, and she cannot turn to such a claim on appeal. That lack of a firing claim undercuts the entire Petition. Second, even if Murphy's case is considered as a termination claim, it still does not warrant review. None of the Questions Presented are worthy of review, and in any case, this is a poor vehicle to review any issues that may exist.

I. This case is a flawed vehicle on all Questions Presented, as Murphy's discrimination claim does not challenge her termination, and she was never subjected to an adverse employment action to sustain her terms and conditions claim.

As detailed in the Counterstatement above, Murphy never claimed in the trial court that her employment was terminated because she is a woman. As explained below, Murphy does try to advance a discriminatory-termination claim in this Court, and indeed, she belatedly tried to do so in the Sixth Circuit, but such efforts cannot create such a claim on appeal. This hole in her case undercuts the entire Petition, for several reasons, such as Murphy's inability to show any adverse action without leaning on the termination. Finally, this is not a flaw that the Court could "work around" if review were granted, so the Court could not review this case without delving into this issue.

First, as the Counterstatement shows, Murphy's Amended Complaint left no doubt that she was *not* pursuing a discriminatory-firing claim, but was merely claiming sex discrimination in her pre-firing "terms and conditions," while her termination was linked solely to her independent retaliation claim. That approach was not an unreasonable strategy, for Murphy likely knew that a straight sex-based-firing claim would have run into several barriers. For example, Coach Hopkins hired Murphy and fired her just three months later, triggering the "same actor" inference—*i.e.*, the notion that discrimination is unlikely when the same actor hires and fires an employee, especially within a short time. *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 464 (6th Cir. 1995). Further, Murphy was replaced by a woman, and in fact, all of Hopkins's assistants in that position have been women. Pet. App. 11a; *id.* 18a (Boggs, J., concurring and stressing replacement issue as alternate ground for affirmance). Finally, it may have been a good strategy—especially with an eye to a jury trial—to advance the retaliation claim by consistently portraying the firing as a result of retaliatory motive, as opposed to portraying the firing as a result of both retaliation *and* as sex discrimination in the first place.

But whatever her motive behind this strategy, Murphy cannot seriously deny that her Amended Complaint conspicuously omitted a standard discriminatory-firing claim. If that complaint meant to state such a claim, then it seems curious indeed that her preliminary statement referred only to "terms and conditions," and that even her basis for jurisdiction referred to terms and conditions, but not to discharge. If the complaint meant to allege a sex-based firing, it is hard to understand why her detailed laundry list of discriminatory events included being called "stupid," and being told not to "get fat like the last girl," but *did not mention her termination.* Indeed, a typical complaint alleges

a firing as the gravamen of a count, and then lists such comments as *evidence* of bias, but Murphy listed the comments *as constituting the discrimination*.

The Magistrate (and the District Court by its adoption of the Magistrate's view) surely understood that Murphy rested her sex-discrimination claim on the pre-firing terms and conditions alone, and that is why the Magistrate was able to find that no adverse action occurred, despite the fact that Murphy's termination, of course, would easily qualify as an adverse action. *See* Pet. Supp. App. 16a.

To be sure, Murphy did try to belatedly and half-heartedly shift to a termination claim in the Sixth Circuit, but that effort is unavailing. First, her complaint plainly did not include such a claim, so nothing on appeal at any level could create one. Second, even if her complaint could be generously read to include such a claim, Murphy waived it when she did not object (in her objections in the District Court) to the Magistrate's finding that she had suffered no adverse employment action. The Magistrate specifically reasoned that Murphy relied on pre-firing events as alleged adverse action, and she fell short.

Murphy tried to explain away this problem in the Sixth Circuit, but her explanation is unpersuasive, and in fact, her Sixth Circuit briefing betrays her own likely understanding that she had not pleaded a termination claim. Murphy's opening brief, in urging that she had suffered an adverse action, first spent over four pages arguing that the non-firing activity amounted to concrete, adverse action, comparing her scenario to cases in which "hostility and professional snubbing" amounted to adverse action. *See* Appellant's Brief (in Sixth Circuit) at 19-23. After striving to bring her non-firing scenario under the umbrella of adverse action, Murphy concluded by comparing her "mistreatment" indirectly to "constructive discharge," and in

her *final* sentence, she threw in that "she was ultimately fired." *Id.* at 23. Had Murphy honestly believed that she had a valid discriminatory-firing claim, and in light of the plain fact that a firing is the gold standard of adverse action, it is absolutely mystifying why Murphy strained so hard to build an adverse action on the other grounds first, relegating the firing to a parting throwaway line.

Murphy's reply brief in the Sixth Circuit is equally inexplicable if she had a termination claim, but makes perfect sense if she had only a terms-and-conditions claim, and she knew that she was belatedly trying to shift gears. That reply *first* tried to defend the view that the non-firing actions were concrete enough on their own; again, that was a curious choice as a leading argument compared to the slam-dunk position that firing is an adverse action.

Then, in trying, as a *backup* position, to rely on termination-as-adverse-action, Murphy raised a truly incredible, and blatantly disingenuous, argument to counter the University's reminder (in our Appellee's Brief at 22-23) that she had waived any such claim when she did not raise the Magistrate's no-adverse-action holding in her Objections to the Report and Recommendation. Murphy claimed that she did not need to object because she had read the Magistrate's opinion to have ruled in *her favor* on the adverse action prong, because, in her view, the Magistrate had "believed the termination was an adverse action, but the other actions were not." *See* Murphy's Reply Brief at 6. "Accordingly, Mrs. Murphy only addressed what the Magistrate 'got wrong' in her Objections." *Id.* In fact, not only did Murphy feign surprise that anyone questioned that she had lost that prong, but she accused the University of being "disingenuous" for claiming otherwise. *Id.* at 6-7.

Murphy's claim—that she thought she had "won" the adverse-action prong—is outrageous because in every other

part of her Sixth Circuit briefs, she frankly acknowledged that she had *lost on that prong*. She said that the District Court found that "she was not subjected to an adverse action," Appellant's Br. at 9, and that the Court had "found that Mrs. Murphy had failed to establish three of the four prongs of the *prima facie* test." *Id.* at 15. And of course, Murphy included a whole section—in her opening brief, before the University addressed the issue in its brief—on the adverse action point. Thus, putting aside that the Magistrate's opinion on its own face rejects Murphy's revisionist account, Murphy's own briefing shows the absurdity of any claim that she had actually "won"—or even that she thought she had won—the adverse-action point.

Therefore, Murphy not only excluded a discriminatory-firing claim from her complaint, but even if she had such a claim there, she waived it after the Magistrate ruled against her on the adverse-action prong. All that she preserved was her insistence that the non-firing activity amounted to adverse action; she did not preserve any argument about the termination itself. Notably, Murphy does not, in this Court, continue to argue that the non-firing actions amount to adverse action. Thus, having unsuccessfully tried to switch to the termination theory in the Petition, she cannot switch back to the other-acts theory now, so she has no way to overcome her failure to show an adverse action, which the University would raise (if review were granted here) as a sure-fire alternate ground for affirmance.

This hole in Murphy's case undermines her entire Petition, as there is no way that she, nor the Court, could "work around" the problem. For example, her first Question Presented asks the Court to review what types of "direct evidence" allow a plaintiff to proceed to trial as an alternative to meeting the *prima facie* test. But her own Question refers to the "link between the termination and gender," and direct evidence has been described as evidence related to the

decisional process at issue. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring). With no termination claim, there is no "decision" to serve as a benchmark with which the "link" could be tethered. And if the Court accepts this case as a terms-only case, then the logic of this Question collapses on itself. That is because, in a terms-only case, the discriminatory decision is not the firing, but is presumably—if the direct evidence construct makes sense at all in a terms case—the decision to engage in the terms-based discriminatory conduct. Here, Murphy alleges that various inappropriate statements *are themselves the discriminatory conduct*, so the question seems to be whether Coach Hoskins's alleged comments are linked to the decision to make the comments. That is, of course, absurd.

Because of issues such as that, the Court cannot escape dealing with the issue of whether Murphy somehow has a termination claim; that is, the Court could not simply address Murphy's stated issues and then remand the "adverse action" issue, if Murphy were somehow to prevail in this Court. Murphy's questions, by linking to the termination, can only be evaluated if this Court first addresses *whether* Murphy has a termination claim. If the Court finds, as it surely would, that she does not, then it would have to try to resolve her remaining claims with the "terms" alone as the anchor, and that effort breaks down quickly.

Consequently, because the Petition would only make sense as a termination case, but Murphy does not actually have such a case, the Petition should be denied.

II. Even if Murphy's case is treated as raising a termination claim, none of her Questions Presented is worthy of the Court's review.

The University submits that, for the reasons in Part I above, Murphy's case cannot be read as maintaining a discriminatory termination claim, so the entire Petition collapses. Nevertheless, should the Court view her case as raising a termination claim, it should still decline to review this case. The Petition should be denied because none of the Questions Presented warrants review, and even if some interesting abstract issues are raised, this case is a poor vehicle for review.

A. Murphy's First Question Presented, regarding direct evidence, does not warrant review.

Murphy claims that the Court should address what type or degree of evidence qualifies as "direct evidence," so that a plaintiff may survive summary judgment without satisfying the more common *McDonnell Douglas* framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972). Murphy claims a split in the circuits, and a need to revisit the discussion of direct evidence, which was addressed by the Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003), and by Justice O'Connor's concurring opinion in *Price Waterhouse*, 490 U.S. 228, 277. *See* Pet. 7-9 (discussing cases in circuits).

This issue, however, does not warrant review for several reasons. First, the University acknowledges that the circuits may have used varying language in explaining the use of "direct evidence" as an alternate path to *McDonnell Douglas*, but that does not mean that the circuits have actually split in the results that they reach. The Sixth Circuit,

for example, has defined direct evidence of discrimination simply as "evidence [that] does not require a fact finder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003). Similarly, the Fifth, Ninth, and Eleventh Circuits have considered direct evidence to be that which is not circumstantial. *See* Pet. 8-9 (citing cases in those Circuits as representing "one side" of the alleged split).

The Second Circuit, which Murphy places on the alleged "other side" of the split, is actually in line with the Sixth Circuit. In the case that Murphy cites, *Rose v. New York City Board of Education*, 257 F.3d 156 (2nd Cir. 2001), a "mixed-motive" case, the court found that repeated remarks by an employer that he would replace plaintiff with someone "younger and cheaper" *were direct evidence* of age discrimination. *Id.* at 162. Such statements do not require an inference to show discrimination.

To be sure, the Third, Fourth, and Seventh Circuits, which Murphy categorizes as disagreeing with the Sixth Circuit and others, have suggested that courts should focus more on the *sufficiency* of evidence needed for a plaintiff to withstand summary judgment without using the *McDonnell Douglas* construct, rather than categorizing the *type* of evidence as direct or circumstantial. *see, e.g., Robin v. Espo Engineering Corp.*, 200 F.3d 1081 (7th Cir. 2000); *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992); *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3rd Cir. 2002). But those circuits' seemingly "more generous" standard has not made a difference for the plaintiffs in those cases, so the "split" may be one of form not substance. That is, several plaintiffs still did not survive summary judgment, even with the "broader" allowance of evidence considered. *See Robin*, 200 F.3d at 1089; *EEOC v. Clay Printing*, 955 F.2d at 941-43; *see also*

Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1111-12 (7th Cir. 1998).

In fact, the Third Circuit seems to be the sole circuit in which the court may have used a more generous standard, and in which a plaintiff survived summary judgment. *See Fakete*, 308 F.3d at 336. There, the court said "the adjective 'direct' is imprecise because certain circumstantial evidence is sufficient to shift the burden of proof regarding causation, if that evidence can fairly be said to *directly reflect* the alleged unlawful basis for the adverse employment decision." *Id.* at 339 (emphasis added) (internal quotes and citation omitted). Thus, while the court seemed to "add" circumstantial evidence to direct evidence, it also restricted plaintiffs to evidence that "directly reflects" the basis for the challenged decision. Equally important, the statements at issue in *Fakete* were linked to the challenged decision, as a supervisor, referring to likely upcoming changes under new management, said that the employer would be "looking for younger single people that will work unlimited hours," and that plaintiff "wouldn't be happy there in the future." *Id.* at 336. So, as in *Rose*, above, such a statement would satisfy what Murphy describe as the Sixth Circuit's more stringent direct evidence test.

Moreover, all of the cases cited as evidence of an alleged "split" were decided before this Court discussed "direct evidence" in *Desert Palace*. Those circuits cited by Murphy as more plaintiff-friendly have not addressed whether *Desert Palace* changes anything, but at least one of those circuits has suggested that it might re-review the matter in a proper case. *See Love-Lane v. Martin*, 355 F.3d 766, 786-87 (4th Cir. 2004) ("[t]o the extent that the Supreme Court's recent decision in [*Desert Palace*] might change the role that the *McDonnell Douglas* burden-shifting framework plays in race discrimination cases," any change would be

irrelevant to plaintiff's inability to withstand a motion for summary judgment).

Thus, this "split" may not exist, and if it does, it should percolate further. The courts of appeals should be allowed to weigh the impact of *Desert Palace*, and the Court should await a case in which a plaintiff's ability to "add" other evidence makes, or would make, a difference.

Equally important, even if this issue were worthy of review, this case is a poor vehicle to do so. Even apart from the conclusive flaw discussed above in Part I—*i.e.*, that Murphy does not present a termination claim here at all—Murphy's case, even considered as a termination case, is not a good one to review the scope or weight of evidence that might satisfy the "direct evidence" method of proof.

The statements that Murphy cites as direct evidence of discrimination would not qualify as direct under any standard, nor would they qualify as especially probative circumstantial evidence. The key to direct status, of course, is that the statements be made in connection with the challenged decision, which here—for argument's sake—is her termination. But none of the comments involved her termination, as all involved far more remote topics, such as Hopkins's alleged "disparaging remarks regarding the capacity of women to serve in the military," Pet. at 2, his alleged statement not to "get fat like the last girl," *id.* at 3, or his alleged comment that training on affirmative action was a "waste of time." Pet. App. 12a; *see* Pet. 1.

B. Neither the Second Question, regarding the "qualification" prong, nor the Third Question, regarding the "similarly situated" prong, warrants review.

Murphy also asks the Court to review two aspects of the four-prong test used to establish a *prima facie* case as the first step of the three-step *McDonnell Douglas* scheme. She asks the Court to examine what a plaintiff must show to establish that she is "qualified" for a job, and to review how "similar" a plaintiff's co-employee must be for purposes of showing that a "similarly-situated" employee outside a protected class was treated differently. Neither question warrants review.

First, the Sixth Circuit has not split from other circuits in how it applies the "qualified" prong. According to Murphy, the Sixth Circuit has "raised the bar" compared with other circuits, Pet. at 12, and "the Sixth Circuit failed to differentiate between objective and subjective qualifications." Pet. at 14. But, just last year, the Sixth Circuit held in an en banc case, *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 575 (6th Cir. 2003), that the inquiry "should focus on a plaintiff's objective qualifications." Murphy insists that the panel opinion here strayed from "objective" measurement in favor of subjective standards, Pet. at 14, but the panel never used the terms objective or subjective. The panel's decision is consistent with sticking to objective evidence, as it focused, not on some objective-subjective distinction, but on the fact that no evidence—objective or not—showed that the University was "ever happy with her performance once she commenced performance." *See* Pet. App. 10a. This unique situation, in which she had performance problems from the first day, differs greatly from those cases in which a court indicates that a once-qualified employee—as demonstrated by objective evidence such as positive reviews—should not be

considered to have lost that "qualified" status based on a later, disputed assessment. *See, e.g., Wexler*, 317 F.3d at 574-75 (rejecting claim that plaintiff, a store manager, was no longer qualified in light of declining sales in his location).

Conversely, if the decision below can be said to conflict with those *other* circuits outside the Sixth that insist on objective evidence—though again, that is not the case—then that "split" would equally exist between the unreported panel decision here and the Sixth Circuit's own standard in *Wexler*, which used the objective standard that Murphy apparently wants the Court to adopt here. Such a conflict, if it exists, would not warrant this Court's review, as *Wexler*, not this case, will govern future cases, and cases such as this are a matter for the Circuit's internal housekeeping through the *en banc* process.

Further, because of the nature of the three-step burden-shifting analysis, a circuit's approach to the "qualified" prong will not truly shift the outcome in most or all cases. All that changes is whether qualification issues are assessed under that prong or reserved for the pretext stage, but that does not change which plaintiffs will survive a summary judgment motion and go to trial. *See, e.g., Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 664 (6th Cir. 2000) (declining to hold lack of license against plaintiff under qualification prong, but noting that "her lack of a license comprises defendant's nondiscriminatory reason for firing her," and thus "she can not lose at the prima facie stage on that ground, even though she would lose on summary judgment anyway barring evidence showing discrimination."); *Flores v. Preferred Technical Group*, 182 F.3d 512 (7th Cir. 1999) (the court considered the qualification issue as part of the pretext stage, but plaintiff nonetheless lost on a motion for summary judgment).

Second, Murphy's third Question Presented, regarding the similarly situated prong, is equally unworthy of this Court's review. The Sixth Circuit has *explicitly rejected* the standard that Murphy claims it has embraced. In an effort to make the Sixth Circuit appear draconian, Murphy states that it and "several other circuits have taken the position that 'similarly situated' means having the same supervisor, the same standards, and the same conduct without any other mitigating circumstances," *See* Pet. at 18, citing *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). Murphy fails to mention, however, that *Mitchell* is not the Sixth Circuit's last word on the subject.

Instead, the Sixth Circuit's standard is enunciated in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), a case ignored by Murphy, yet more favorable to plaintiffs than *Mitchell*.[2] Recognizing that language in *Mitchell* "appears to invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment," the court explains that, "*Mitchell* has not been so narrowly construed," citing *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). *Ercegovich*, 154 F.3d at 352. *Ercegovich* affirms *Pierce's* standard that plaintiff is "simply 'required to prove that all of the *relevant* aspects of his employment situation were nearly identical to those of [the non-minority's] employment situation.'" (Emphasis in original; citation and internal quotation marks omitted.) *Id.*

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[2] Murphy's failure to mention *Ercegovich* in her Petition here is particularly puzzling, as she discussed it at length in her petition to the Sixth Circuit for rehearing/rehearing *en banc*. She vigorously argued that the court of appeals applied the wrong standard, and that the panel here required more than *Ercegovich* requires. Even if that were true, that would weigh against review here, as the reported *Ercegovich* decision represents the Sixth Circuit's view.

Murphy also mischaracterizes the analysis of the panel's decision below, which did, in fact, cite and apply *Ercegovich*. The panel noted Murphy's assertion that Casuto was a similarly situated male, because each was by superficial title alone, an assistant coach under Hopkins. But as the court explained: "However, this factor cannot be examined in a vacuum. 'Similarly-situated,' as a term of art, means similarly situated in all relevant aspects." Pet. App. 10a. The court then proceeded to determine whether Murphy and Coach Casuto were similar "in all relevant aspects," that is, aspects against which any alleged differences in treatment could be tested.

The court below correctly used the *Ercegovich* standard, and gave Murphy the benefit of a "reframing" of the fourth prong, given its conclusion that she held a unique position. Indeed, under the alternate fourth prong, Murphy would plainly fail, for she was replaced by a woman. Pet. App. 11a; *id.* at 18a (Boggs, J. concurring).

Nor do the cases cited by Murphy show any conflict among the circuits. Murphy claims that some circuits are "even more onerous" than the Sixth Circuit, because they use a "nearly identical" standard. Pet. at 18-19 citing *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984) and *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086 (5th Cir. 1995). Murphy confuses, however, the context in which the phrase is used, by those courts. Both courts, like the Sixth Circuit in *Ercegovich*, the phrase "nearly identical" in conjunction with, not as opposed to, "all relevant aspects."

Further, even if some circuits seem to have moved the "similarly situated" prong from the prima facie stage to the pretext stage, *see* Pet. at 19, that does not change the outcome for a plaintiff, and the circuits remain consistent in the results

they reach. The same plaintiffs still go to trial, and the same plaintiffs fail to survive summary judgment. *See, e.g., Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000) (plaintiff failed to survive summary judgment even though relieved of the requirement to present "comparative" evidence at the prima facie stage); *Kosereis v. State of Rhode Island*, 331 F.3d 207 (1st Cir. 2003).

Finally, on this issue as well, Murphy's case presents a poor vehicle for review. On top of the many flaws discussed above, her case is flawed regarding this specific issue because she did not even come close to being comparable to Casuto, the long-time, award-winning assistant coach. Whatever gray area might exist, if any, on the purported spectrum from broadly comparable to "nearly identical," Murphy was miles away from Casuto, and would fail any standard of comparability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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